No. 82-1474

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1983

CHARLES R. HOOVER, HOWARD H. KARMAN,
ROBERT D. MYERS, and HOWARD J. WOLFINGER

Petitioners,
versus
EDWARD RONWIN,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Of Counsel

PETITION FOR WRIT OF CERTIORARI FILED
MARCH 2, 1983
ORDER GRANTING PETITION FOR
WRIT OF CERTIORARI
MAY 16, 1983

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IN THE UNITED STATES SUPREME COURT

No. 82-1474

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EDWARD RONWIN,
Box 2527
Scottsdale, Arizona 85252
Plaintiff in Propria Persona

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

EDWARD RONWIN, a singleman, Plaintiff,	NO. CIV 78-193 PHX WPC
vs.	COMPLAINT
STATE BAR OF ARIZONA; GEORGE READ CARLOCK and WANDA CARLOCK, Husband and Wife; ROBERT D. MYERS and JUDITH MYERS, Husband and Wife; HAROLD J. WOLFINGER and JANE DOE WOLFINGER, Husband and Wife; JAMES L. RICHMOND and JANE DOE RICHMOND, Husband and Wife; D. THOMPSON SLUTES and	(Jury Trial Demanded)

JANE DOE SLUTES, Husband and Wife; HOWARD H. KARMAN and JANE DOE KARMAN, Husband and Wife; and CHARLES R. HOOVER and JANE DOE HOOVER, Husband and Wife,

Defendants.

COMES NOW the Plaintiff, EDWARD RONWIN, pro se, and for his Complaint against the above-named Defendants, alleges as follows:

JURISDICTION

I

This action arises under the Federal Anti-Trust Statutes, and in particular 15 U.S.C.A.§ 1 et seq., and the laws of the State of Arizona. Jurisdiction is conferred upon this Court by virtue of the provisions of

15 U.S.C.A.§ 15 and the principle of pendant jurisdiction. The acts and omissions hereinafter complained of occurred within the District of Arizona.

THE PARTIES

II

The Plaintiff, EDWARD RONWIN, is a domiciliary and citizen of the State of Arizona.

The Defendant, STATE BAR OF ARIZONA, is a private entity with principal offices in Phoenix, Maricopa County, State of Arizona, to which all persons licensed to practice law in the State of Arizona belong. The male Defendants, above-named, were all members of the Committee on Examinations and Admissions of the Supreme Court of Arizona at times

relevant to this action; and, as such, presided over and conducted the process by which applicants for membership in said Bar were examined to purportedly determine their ability in law so as to permit a decision on whether or not applicants were to be admitted to said Bar. The male Defendants all acted on their own behalves and on behalf of their respective marital communities; and all of the Defendants acted jointly and severally in the acts and omissions hereinafter complained of. All natural person Defendants are domiciliaries and citizens of the State of Arizona.

OPERATIVE FACTS

III

On February 27, 28 and March 1, 1974, the Defendants conducted an examination of Bar applicants, which group of applicants included the Plaintiff.

IV

Prior to said examination, the Defendants had announced that a grade of Seventy (70) was required to pass the examination.

V

In April, 1974, the Defendants announced the results of said examination and claimed that Plaintiff did not receive a passing grade of Seventy (70).

VI

The Defendants did not grade on a Zero to One Hundred (0 to 100) scale; rather, they used a "raw score" system. After the raw scores were known, the Defendants picked a particular raw score value as equal to the passing grade of Seventy (70). Thereby the number of Bar applicants who would receive a passing grade depended upon the exact raw score value chosen as equal to Seventy (70); rather than achievement by each Bar applicant of a pre-set standard.

VII

The aforesaid conduct, which the Defendants entered into as a conspiracy or combination, was intended to and did result in a restraint of trade and commerce among

the Several States by artificially reducing the numbers of competing attorneys in the State of Arizona; and, in further consequence of said conduct, Plaintiff was among those artificially prevented from entering into competition as an attorney in the State of Arizona and thereby further deprived of the right to compete as an attorney for the legal business deriving from or involving the Several States of the United States, including Arizona.

VIII

When Plaintiff complained of the unlawful behavior of the Defendants, recited above, using the procedures provided by the rules of the Supreme Court of Arizona for said purpose, the Defendants without

notice, hearing or medical examination, falsely and maliciously labelled the Plaintiff as "mentally unable to engage in the active and continuous practice of law," and, denied Plaintiff the right to take the July, 1974 Bar examination.

IX

In consequence of the behavior of the Defendants, Plaintiff has sustained and continues to sustain damages in a sum no less than FOUR HUNDRED THOUSAND and 00/100 ($400,000.00) DOLLARS and Plaintiff is entitled to a recovery of treble said amount.

WHEREFORE, Plaintiff prays this Court for Judgment against the Defendants, jointly and severally, as follows:

1. In the amount of $1,200,000.00 as and for trebled compensatory damages;

2. For Plaintiff's costs and disbursements herein; and,

3. For such other and further relief as to this Court seems just and proper.

DATED this 13th day of March, 1978.

/s/Edward Ronwin
EDWARD RONWIN, in Propria Persona

FENNEMORE, CRAIG, von AMMON & UDALL
A Professional Corporation
(Philip E. von Ammon)
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Phoenix, Arizona 85003
(602) 257-8700
Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

EDWARD RONWIN, a singleman, Plaintiff, vs. STATE BAR OF ARIZONA; GEORGE READ CARLOCK and WANDA CARLOCK, Husband and Wife; ROBERT D. MYERS and JUDITH MYERS, Husband and Wife; HAROLD J. WOLFINGER and JANE DOE WOLFINGER, Husband and Wife; JAMES L. RICHMOND and JANE DOE RICHMOND,	NO. CIV 78-198* PHX WPC ANSWER

* The case number is incorrect and should be 78-193

Husband and Wife; D. THOMPSON SLUTES and JANE DOE SLUTES, Husband and Wife; HOWARD H. KARMAN and JANE DOE KARMAN, Husband and Wife; and CHARLES R. HOOVER and JANE DOE HOOVER, Husband and Wife,

Defendants.

Defendants answer as follows:

1. Answering paragraph I, defendants deny this Court has jurisdiction over this matter and deny they committed any acts or omissions sufficient to give rise to any cause of action against them.

2. Answering paragraph II, defendants allege the State Bar of Arizona is an integrated bar association created and continued under the direction and control of the Supreme Court of Arizona, admit the principal offices of the State Bar of Arizona are in Phoenix, Maricopa County, Arizona, and admit that all persons licensed to practice law in the State of Arizona are required to be members of the State Bar of Arizona. Defendants admit the male defendants in this action were members of the Committee on Examinations and Admissions of the Supreme Court of Arizona in 1974 and admit said committee members were appointed to examine applicants for membership to the State Bar of Arizona and to

recommend to the Arizona Supreme Court for admission to practice those applicants found to have the necessary qualifications and to fulfill the requirements for admission, as approved by the Arizona Supreme Court. Defendants admit they are citizens of the State of Arizona, admit plaintiff is a citizen of the State of Arizona and deny the remaining allegations of paragraph II.

3. Defendants admit the allegations of paragraphs III and IV.

4. Answering paragraph V, defendants admit the results of the bar examination conducted in February and March, 1974, were announced in April, 1974, and allege plaintiff did not receive a passing grade on that examination.

5. Defendants deny the allegations of paragraphs VI, VII and IX.

6. Answering paragraph VIII, defendants admit plaintiff was denied permission to take the July, 1974 Arizona bar examination and deny the remaining allegations of that paragraph.

7. Defendants deny each allegation not specifically admitted herein.

AFFIRMATIVE DEFENSES

8. Plaintiff has failed to state a claim upon which relief can be granted.

9. This action is barred by the doctrine of judicial immunity.

10. This action is barred by the doctrine of res judicata.

11. This action is barred by the applicable statute of limitations.

12. This action must be dismissed because, if any restriction of trade occurred, it was the result of valid governmental action.

WHEREFORE, defendants demand judgment, their costs and attorneys' fees incurred herein.

FENNEMORE, CRAIG,
von AMMON & UDALL
A Professional
Corporation

By s/Ruth V. McGregor
Philip E. von Ammon
Ruth V. McGregor
100 West Washington St.
Suite 1700
Phoenix, Arizona 85003
Attorneys for Defendants

COPY of the foregoing
mailed this 5th day
of April, 1978, to:

Edward Ronwin
Box 2527
Scottsdale, Arizona 85252
Plaintiff in Propria Persona

s/Ruth V. McGregor

FENNEMORE, CRAIG, von AMMON & UDALL
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

EDWARD RONWIN, Plaintiff, vs. STATE BAR OF ARIZONA, et al., Defendants.	NO. CIV 78-193 PHX MLR DEFENDANTS' MOTION TO DISMISS

Pursuant to Rule 12(b), Federal Rules of Civil Procedure, defendants move that this action be dismissed for failure to state a claim

upon which relief can be granted, and for lack of jurisdiction over the subject matter.

FENNEMORE, CRAIG,
von AMMON & UDALL
A Professional
Corporation

By /s/Philip E. von Ammon
Philip E. von Ammon
Ruth V. McGregor
1700 First National
Bank Plaza
100 West Washington Street
Phoenix, Arizona 85003
Attorneys for
Defendants

. . .[1]

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[1] Brief In Support of Motion Excluded.

In the United States District Court

For the District of Arizona

NO. CIV 78-193 PHX MLR

Edward Ronwin,

Plaintiff,

vs.

State Bar of Arizona, et al.,

Defendants.

[Filed Oct. 9, 1979]

ORDER AND JUDGMENT

This cause came on to be heard before the Court on the following motions:

1. Motion of plaintiff seeking recusal of judge.

2. Motion of defendants to dismiss the complaint.

The Court, having considered the pleadings, the memoranda of points and authorities filed by the parties and the argument of counsel for

defendants, plaintiff having waived his appearance and having waived oral argument on his motion seeking recusal of judge, finds as follows:

1. Plaintiff's motion seeking recusal of judge is legally insufficient.

2. The allegations of the complaint fail to state a claim upon which relief can be granted.

3. The Court lacks jurisdiction of the subject matter.

4. The plaintiff lacks standing to seek the relief requested.

Now, therefore, it is Ordered and Adjudged as follows:

1. The motion of plaintiff seeking recusal of judge is hereby denied.

2. The motion of defendants to dismiss is hereby granted.

3. The Clerk is hereby directed forthwith to enter judgment in favor of the defendants, and each of them, and against the plaintiff.

4. Defendants' costs shall be taxed pursuant to law. Done in Open Court this 23rd day of March, 1979.

_____

United States District Judge

JUDGMENT ON DECISION BY THE COURT

United States District Court

FOR THE

DISTRICT OF ARIZONA

CIVIL ACTION FILE NO. 78-193 Phx

EDWARD RONWIN	)	
	)	
vs.	)	JUDGMENT
	)	
STATE BAR OF ARIZONA et al	)	

This action came on to ~~trial~~ (hearing) before the Court, Honorable Manuel L. Real, United States District Judge, presiding, and the issues having been duly ~~tried~~ (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff take nothing and complaint and action are dismissed.

Dated at Phoenix, Arizona,

this 12th day of October, 1979.

/s/ W. J. FURSTENAU
Clerk of Court

/s/ Dorothy Ewart
By: Dorothy Ewart, Deputy Clerk

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

EDWARD RONWIN, Plaintiff	)	CV 78-193-PHX MLR
vs.	)	ORDER
STATE BAR OF ARIZONA, et al, Defendants.	)	

Plaintiff has moved for a new trial in the above entitled matter.

The Court having considered this matter

IT IS ORDERED the motion is denied.

DATED: November 20, 1979.

/s/
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

Edward RONWIN, Plaintiff-Appellant,

v.

STATE BAR OF ARIZONA, Carlock, George Read and Wanda Myers, Robert D. and Judith Wolfinger, Harold J. and Jane Doe Richmond, James L. and Jane Doe Karman, Howard H. and Jane Doe Hoover, Charles R. and Jane Doe, Defendants-Appellees.

No. 80-5004.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 16, 1981.

Decided Dec. 14, 1981.

Appeal from the United States District Court for the District of Arizona.

Before FERGUSON, BOOCHEVER, Circuit Judges, and HATTER,* District Judge.

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*The Honorable Terry J. Hatter, Jr., United States District Judge for the Central District of California, sitting by designation.

HATTER, District Judge:

Ronwin brought this suit contending that the State Bar of Arizona (Bar) committed an antitrust violation in its grading of the February, 1974 Arizona bar examination. The district court dismissed Ronwin's complaint and denied his motion for recusal. We reverse the district court's dismissal of Ronwin's complaint, and affirm the denial of the motion for recusal.

I

FACTS

Ronwin took the Arizona bar examination in February, 1974. Two months later, he was notified that he had failed the examination. He attempted unsuccessfully to have his

exam reviewed by the State Supreme Court.[1/]

Ronwin applied to take the July, 1974 bar examination but was denied permission because the Bar found it was unable to certify that he was "mentally and physically able to engage in active and continuous practice of law." See* Ariz.Sup.Ct.R. 28(c)(IV)(5). The Arizona Supreme Court subsequently created a special committee to conduct formal hearings regarding allegations of mental unfitness. See Ariz.Sup.Ct.R. 28(c)(XII)(D). After holding a hearing, this special committee found

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[1/]The Arizona court refused to review his exam, and the United States Supreme Court denied certiorari. Ronwin v. Committee on Examination and

(Continued on next page)

* Words italicized in original appear underscored except for foreign words.

on January 21, 1975, that Ronwin was mentally unable to engage in the practice of law.[1/]

In March of 1978, Ronwin filed the instant antitrust action. He alleged that the Bar illegally restricted competition among attorneys practicing in Arizona, thus violating section 1 of the Sherman Act, 15 U.S.C. § 1, by limiting the number of attorneys who receive passing grades on the bar exam

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(Continued from previous page) Admissions, 419 U.S. 967, 95 S.Ct. 231, 42 L.Ed.2d 183 (1974).

[1/]The committee's decision was affirmed unanimously by the Arizona Supreme Court. Application of Ronwin, 113 Ariz. 357, 555 P.2d 315 (1976), cert. denied, 430 U.S. 907, 97 S.Ct. 1178, 51 L.Ed.2d 583 (1977). In Ronwin v. Daughton, No. 77-2318 (9th Cir. August 9, 1979)(unpublished memorandum), this court concluded that the determination that Ronwin is unfit to practice law cannot be challenged in the federal courts.

in a given year. Although Ronwin refuses to use the term, his allegation apparently is that the Bar grades the exams on a "curve", i.e., it determines the number of attorneys to be admitted, and then sets the minimum passing raw score accordingly. According to Ronwin's complaint, the Bar set the curve without reference to "achievement by each bar applicant of a preset standard [of competence]."

The case was assigned to Judge Real, who was also presiding over other cases in which Ronwin was a party.[1/] Ronwin sought Judge Real's recusal from this case, and the Bar

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[1/] Judge Real was the judge in Ronwin v. Daughton, No. Civ. 76-872 (D.Ariz. 1979), aff'd mem. No. 77-2318 (9th Cir. Aug. 9, 1979)(unpublished memorandum), and Ronwin v. Segal, No. Div. 76-924 (D.Ariz. 1977).

sought to have the case dismissed. On October 12, 1979, Judge Real entered judgment denying Ronwin's recusal motion and granting the Bar's motion for dismissal. Ronwin filed a timely notice of appeal.

II

DISMISSAL OF RONWIN'S ACTION

In his order, Judge Real gave three reasons for dismissing the complaint: (1) the complaint failed to state a claim upon which relief could be granted; (2) the court lacked jurisdiction over the subject matter; and (3) the plaintiff lacked standing to seek the relief requested. These reasons will be discussed individually.

A. FAILURE TO STATE A CLAIM

Judge Real apparently found, as the Bar contended, that, as an agency of

the state of Arizona, it is exempt from federal antitrust laws. The Bar's position is that, assuming, arguendo, it had an improper purpose, i.e., to artificially limit the number of attorneys admitted each year, its status as a state agent protects it from antitrust liability. It relied primarily on Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977).

In Bates, the Supreme Court held that a disciplinary rule adopted by the Arizona Supreme Court and enforced by the Arizona state bar, which prohibited lawyers from advertising, did not violate the federal antitrust laws under the "state-action" exemption first announced in Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). 433 U.S. at 359-63,

97 S.Ct. at 2696-99.[4/] The Court indicated that the real party in interest was the Arizona Supreme Court, which had adopted the disciplinary rule. Id. at 361, 97S.Ct. at 2697. The rule was found to reflect a clear articulation of the state policy. Although enforcement was committed to a state agency, i.e., the state bar, that enforcement was subject to constant supervision by the state policymaker, the Arizona Supreme Court. Id. at 361-62, 97 S.Ct. at 2697-98. Finally, the Court stated that rules governing the behavior of attorneys affect a significant state interest. Id.

[4/]The Court held, however, that the disciplinary rule violated the first and fourteenth amendments of the United States Constitution. Id. at 363-84, 97 S.Ct. at 2698-2709.

Unlike the situation in Bates, here: (1) a state agency, as opposed to the state policymaker, was committing the alleged anticompetitive act; and, more importantly, (2) the alleged anticompetitive act did not fulfill a clearly articulated state policy.

In a case factually closer to Ronwin's, the Supreme Court held that the activities of the county bar association and the Virginia State Bar in publication and enforcement of a minimum fee schedule was not shielded by the state action exemption from antitrust laws. Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-92, 95 S.Ct. 2044, 2013-16, 44 L.Ed.2d 572 (1975). The Court stated:

The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. Parker v. Brown, 317 U.S., [sic] at 350-352, 63 S.Ct at 313-314; Continental Co. v. Union Carbide, 370 U.S. 690, 706-707, 82 S.ct. 1404, 1414-1415, 8 L.Ed.2d 777 (1962). here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent. Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees, leaving regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them or require the type of price floor which arose from respondents' activities.... It is not enough that, as the County Bar puts it, anticompetitive conduct is

> 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.

Id. at 790-91, 95 S.Ct. at 2014-15. Goldfarb has placed narrow limits on the state action exemption of Parker. Antitrust Adviser § 1.14, at 19 (Shepard's 2d ed. 1978). The key inquiry is whether the state, in this case the Arizona Supreme Court, had an active hand in the allegedly anticompetitive policies.

Two recent Supreme Court decisions impart significance to the distinction between Bates and Goldfarb. In City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978), and in California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980), the

Court held that for the state-action exemption to apply, "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy;' [and] the policy must be 'actively supervised' by the state itself." The failure to meet either requirement precludes application of the antitrust immunity. Midcal, 445 U.S. at 105, 100 S.Ct. at 943.

In the instant case, the Arizona Supreme Court had delegated to the Bar the duty of examining attorney applicants to determine whether they "have the necessary qualification." Ariz.Sup.Ct.R. 28(a). At all times relevant to this action, however, the Rules contained no provision regarding

how the Bar should grade exams.[1/] According to Ronwin, the Bar's method of grading the exams was not designed to fulfill the purpose established by the Arizona Supreme Court.

Viewing the present case in light of Midcal's state-action requirements, we conclude that the challenged grading procedure fails to qualify for antitrust immunity. The alleged restraint was not "clearly articulated and affirmatively expressed as state policy," Midcal's first requirement. 445 U.S. at 105, 100 S.Ct. at 943.

[1/] Effective March 17, 1980, the Arizona Supreme Court amended Rule 28(c), at VII, to include a requirement that the Bar "file with the Court thirty (30) days before each examination the proposed formula for grading the entire examination." Our analysis of the present issue might be different had this provision been in effect at the time Ronwin took the exam.

Like the defendant bar associations in Goldfarb, the Arizona Bar has no statute or Supreme Court Rule to point to as requiring their challenged grading procedure. See 421 U.S. at 790-91, 95 S.Ct. at 2014-15.

The fact that the Arizona Supreme Court has delegated to the Bar the general authority to examine applicants and routinely accepts the Bar's recommendations regarding admission does not alone clothe the Bar's private grading policies with blanket immunity from the antitrust laws. "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private [restraint]." Midcal, 445 U.S. at 106, 100 S.Ct. at 944. As the Court emphasized in Goldfarb, "[i]t is

not enough that, as the...Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." 421 U.S. at 791, 95 S.Ct. at 2015.

Bates would be on all fours with the instant case if Bates had involved a general supreme court rule requiring lawyers to act in a professional manner, and that rule had been interpreted by the Bar as requiring an absolute ban on lawyer's advertising. however, the rule prohibiting advertising had been explicitly adopted by the state supreme court. Alternatively, if the state supreme court had, in the instant case, stated explicitly that only a certain number of attorneys would be admitted to the

Bar each year there might be immunity for the Bar's carrying out this directive under Bates. Consequently, even if it were established that the Bar was actively supervised by the state supreme court, that factor alone would be insufficient to justify applying state-action immunity. Midcal, 445 U.S. at 105, 100 S.Ct. at 943.

We do not agree with our dissenting colleague's contention that our resolution of the state-action issue is inconsistent with this court's prior decision. Hackin v. Lockwood, 361 F.2d 499 (9th Cir. 1966); Chaney v. State Bar of California, 386 F.2d 962 (9th Cir. 1977); and Brown v. Board of Bar Examiners, 623 F.2d 605 (9th Cir. 1980) do not support the dissent's contention that bar grading

procedures inherently involve state action, that such procedures may be challenged only on constitutional grounds, and that the Arizona Supreme Court was the proper defendant in this case. These cases did not involve antitrust challenges to bar grading procedures. The plaintiffs in all three cases based their claims on alleged violations of their individual constitutional rights under 28 U.S.C. § 1343 or 42 U.S.C. § 1983.[5/]

[5/] In Hackin and Brown, the plaintiffs sued under 28 U.S.C. § 1343 which authorizes actions "[t]o redress the deprivation [of an individual's fourteenth amendment rights] under color of any State law...." Similarly, the plaintiff in Chaney sued under 42 U.S.C. § 1983, claiming that his civil rights had been violated by the bar's refusal to certify him for admission. (Continued on next page)*

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* Continuation instructions added for convenience of the Court.

The national policy in favor of competition, Midcal, 445 U.S. at 106, 100 S.Ct. at 944, should not be

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(Continued from previous page)
The dissent imparts great significance to the statement in Brown that "the only constraints on the states' exclusive jurisdiction [over bar admission matters] are constitutional in nature...." 623 F.2d at 609. This statement, however, is only true in terms of § 1343 actions like the one at issue in Brown because, as the court notes in the very next sentence: "federal courts are granted jurisdiction under 28 U.S.C. § 1343 to vindicate [only] constitutional rights." This jurisdictional limitation stems from the express language of § 1343, not from the fact that the plaintiff was challenging a bar admission policy. One need go no farther than Goldfarb, where the Court held that the minimum-fee schedule enforced by the state bar violated § 1 of the Sherman Act, to see that Ronwin's complaint established subject-matter jurisdiction under federal antitrust laws.

Similarly, a careful reading of the three decisions reveals that they do not hold that a state supreme court is the only proper defendant in challenges to bar grading procedures.
(Continued on next page)

thwarted absent a clear articulation by the Arizona Supreme Court that it

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(Continued from previous page)
As the court explained in Brown, the state supreme court is the proper party when it has promulgated the specific challenged rule. 623 F.2d at 608 n.6.

In Hackin, as the Brown court noted, the court held that the "State Bar of Arizona is not an appropriate party to the suit because it cannot promulgate or change the rules governing admission to practice in Arizona." 361 F.2d at 500. The court emphasized that the admission rule at issue, barring graduates of unaccredited law schools from taking the bar exam, was directly promulgated and enforced by the state supreme court. Id. at 500-01. In Chaney, the court's discussion clearly concerns finality and the nature of the plaintiff's claim, and has no relevance to the issues of state action or proper parties. See 386 F.2d at 966-67. It also should be noted that the Chaney court discusses the plaintiff's restraint of trade contention (similar to Ronwin's claim) at length, and rejects it on factual rather than jurisdictional grounds. Id. at 965. Thus, these decisions offer no support for the contention that there is a
(Continued on next page)

had adopted a policy of limiting the number of attorneys admitted to the Arizona bar each year. Absent such a declaration, Ronwin must be given an opportunity to prove that the Bar's policy was designed to limit the number of attorneys, as opposed to being designed to ensure that attorneys have the necessary qualifications. Thus, Ronwin's action should not have been dismissed on the ground that the Bar enjoys absolute immunity under the antitrust laws.

B. SUBJECT MATTER JURISDICTION

The requirement of interstate commerce established by the Sherman Act, 15 U.S.C. § 1, is

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(Continued from previous page)
blanket rule making state supreme courts the only proper defendants in all bar admission cases.

jurisdictional. See Western Waste Service Systems v. Universal Waste Control, 616 F.2d 1094, 1097 (9th Cir.), cert. denied, 449 U.S. 869, 101 S.Ct. 205, 66 L.Ed.2d 88 (1980); see generally McLain v. Real Estate Board, Inc., 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980). Judge Real evidently found that the Bar's alleged activity did not affect interstate commerce so as to invoke jurisdiction under the Sherman Act, 15 U.S.C. § 1. The Bar contends that denying Ronwin admission to the Arizona bar is a purely local matter, and thus, the jurisdictional requirement of the Sherman Act was not satisfied by Ronwin's complaint. Ronwin responds that the services of Arizona lawyers are required by people living outside Arizona. By artificially restricting

the number of lawyers admitted to practice in Arizona, the price paid by out-of-state clients for legal services performed by Arizona lawyers is higher than it would be if the number of lawyers was not restricted.

In order to establish jurisdiction under the antitrust laws, a plaintiff must establish that the defendant's activity either (1) is itself in commerce or (2) "has an effect on some other appreciable activity demonstrably in interstate commerce" McLain, 444 U.S. at 242, 100 S.Ct. at 509 (emphasis added). Because of the confusion surrounding both of these tests, we will consider Ronwin's allegation of interstate commerce under both the "in commerce" and the "effect on commerce" tests. See Bain

v. Henderson, 621 F.2d 959, 960 n.1 (9th Cir. 1980).

(1) The "in commerce" test

The leading Supreme Court decision applying the "in commerce" test is Goldfarb v. Virginia State Bar, 421 U.S. at 783-86, 95 S.Ct. at 2011-13. In Goldfarb, plaintiffs alleged that the Virginia State Bar was fixing the prices charged by lawyers handling real estate transactions. In upholding jurisdiction, the Court noted that the real estate transactions which require legal services are frequently interstate transactions. 421 U.S. at 783-84, 95 S.Ct. at 2011-12. Thus, the Court reasoned that any restraint on those services has a substantial effect on interstate commerce. Id. at 785, 95

S.Ct. at 2012.[1/]

In the instant case, Ronwin has not specifically stated which interstate transactions require legal services. See Bain, 621 F.2d at 961. Nor has he indicated how substantial an effect on interstate commerce results from restricting the number of lawyers practicing in Arizona. Ronwin does have the burden of establishing

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[1/]The lawyer was required to examine the title to the property which was being purchased before financing could be obtained. Financing was available through out-of-state agencies. The court concluded:

> Given the substantial volume of commerce involved, and the inseparability of this particular legal service from the interstate aspects of real estate transactions, we conclude that interstate commerce has been sufficiently affected [footnote omitted].

421 U.S. at 785, 95 S.Ct. at 2012.

jurisdiction. McLain, 444 U.S. at 242, 100 S.Ct. at 509. However, it is not inconceivable that he could establish that legal services constitute an indispensable and inseparable component of certain interstate transactions. Therefore, we remand for further findings on the jurisdictional question. See McLain, 444 U.S. at 246, 100 S.Ct. at 511, ("a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief'" (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957))). Cf. Bain, 621 F.2d at 960-61 (because the court found that under no conceivable set of facts could the plaintiff meet the Goldfarb

test, it affirmed the district court's dismissal).

(2) The "effect on commerce" test

In McLain, plaintiffs charged that various New Orleans-based real estate brokers were engaged in a price-fixing conspiracy. The Court held that plaintiffs had shown that defendants' conduct affected interstate commerce.[8] McLain, 444 U.S. at 245, 100 S.Ct. at 510-11. Specifically, the Court noted indications in the record: (1) that "an appreciable amount of commerce [was] involved in the financing of

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[8] The Court specifically stated that a party need only show that a defendant's general business, as opposed to the alleged illegal conduct, affected interstate commerce in order to meet the jurisdictional requirement. McLain, 444 U.S. at 242, 100 S.Ct. at 509.

residential property in the Greater New Orleans area" and that the commerce involved various interstate corporations, id. at 245, 100 S.Ct. at 510-11; and (2) that the activities of the real estate brokers, by affecting the terms and frequency of local real estate transactions, could have a "not insubstantial effect on interstate commerce." Id. at 246, 100 S.Ct. at 511.

Ronwin has not alleged either that there are an appreciable number of interstate transactions taking place in Arizona or that limiting the number of lawyers has a not insubstantial effect on the number or size of these transactions. However, as is true under the "in commerce" test, it is not inconceivable that Ronwin will be able to establish jurisdiction under the "effect on commerce" test. See,

e.g., McLain, 444 U.S. at 245-47, 100 S.Ct. at 510-11; Western Waste Service, 616 F.2d at 1097-99. Therefore, on remand the district court should initially give Ronwin the opportunity to prove that his complaint meets the jurisdictional requirements under either of the tests discussed above.

C. STANDING

In order to have standing to maintain a private antitrust action, a party must allege injury to the party's business or property occurring by reason of the antitrust violation, 15 U.S.C. § 15; Solinger v. A. & M. Records, Inc., 586 F.2d 1304, 1309 (9th Cir. 1978), cert. denied sub nom. Motown Record Corp. v. Solinger, 441 U.S. 908, 99 S.Ct. 1999, 60 L.Ed.2d 377 (1979). The Bar contends that even if it committed an antitrust

violation, the violation did not cause Ronwin's injury. The Bar relies on the fact that Ronwin was found mentally unfit to engage in the practice of law. Thus, according to the Bar, even if Ronwin had passed the Bar exam, he would not have been admitted to practice in Arizona.

Ronwin was not found mentally unfit to practice law until July of 1974, three months after the exam results were released. If Ronwin had passed the exam in April, he arguably would have been able to practice law for the three months until he was found to be mentally unfit.[9/] Because the Bar's

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[9/]The Bar does not argue that Ronwin would have been denied admission in April because of his alleged mental handicap had he passed the exam at that time, nor would it be appropriate for this court to speculate that Ronwin would have been denied admission to the Bar as early as April on these grounds.

alleged illegal action caused Ronwin to be denied admission to the Bar, even if for only three months, Ronwin has sufficiently alleged that he was injured by reason of an unlawful practice. See Kapp v. National Football League, 586 F.2d 644, 648 (9th Cir. 1978), cert. denied, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979). Cf. Solinger, 586 F.2d at 1311 (prospective purchaser of company has standing to sue companies that foreclosed his ability to enter market).

In order to recover damages, Ronwin will have to prove that the Bar's actions caused him actual damages. However, an allegation of even minimal actual damages suffices to confer standing under the antitrust laws. See First Beverages, Inc. v.

Royal Crown Cola Co., 612 F.2d 1164, 1175 (9th Cir.), cert. denied, 447 U.S. 924, 100 S.Ct. 3016, 65 L.Ed.2d 1116 1980). An antitrust plaintiff is held to a higher standard in proving the fact of damage, which is essentially an element of causation, than in proving the measure of damages. Knutson v. Daily Review, Inc., 548 F.2d 795, 811 (9th Cir. 1976), cert. denied, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977). If the 1974 bar exam may still be impartially regraded to ascertain whether Ronwin would have received a passing grade, but for the alleged improper method of restricting bar admission, the court may so order and supervise such a procedure. If the court decides that such a remedy is no longer feasible, under the peculiar circumstances of this case, whereby

Ronwin will not be entitled to practice law in Arizona, the court would be justified in presuming that he would have passed for the purpose of ascertaining damages, if any. The amount of damages would be limited to Ronwin's loss of earnings, between April, when he would have been admitted to the Bar, and July, when the Bar found him unfit to practice law.[19] See Murphy Tugboat Co. v. Crowley, 658 F.2d 1256 (9th Cir. 1981)(special solicitude for proof of damages when defendant's conduct has

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[19]Although the Bar has not raised it, there may be an eleventh amendment issue in this case. The Bar is a state agency which is funded primarily from the dues collected from its members. Ariz.Sup.Ct.R. 27. However, it is unclear whether the Bar receives any monies from the state treasury, and if it does, whether this

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been a factor in speculative nature of damages).

III

THE RECUSAL QUESTION

Ronwin appeals Judge Real's denial of his motion for recusal. At the

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would necessarily immunize the Bar from suit, brought in federal court seeking monetary relief. The Bar has been established as an organization that can sue or be sued, Ariz.Sup.Ct.R. 27, but the above Supreme Court Rule would not constitute a waiver for eleventh amendment purposes.

Since the Bar has not raised the argument, it may be fair to assume that tne Bar receives no money from the State treasury. However, if the Bar receives any money from the State treasury, the district court, absent a waiver, may lack jurisdiction. See State of New Mexico v. American Petrofina, Inc., 501 F.2d 363, 366-67 & n.6. (9th Cir. 1974)(stating in dicta that the eleventh amendment would create serious difficulties in a suit for damages against the state).

proceeding below, Ronwin set forth, in various affidavits and motions, facts which he contends indicate that Judge Real was biased and prejudiced against him. Therefore, he contends that Judge Real was required to recuse himself pursuant to 28 U.S.C. §§ 144 and 455.[11/]

[11/] 28 U.S.C. § 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before

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The test for disqualification is the same under both sections 144 and 455. United States v. Sibla, 624 F.2d 864,

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the beginning of the term [session] at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Under this section the district judge must accept the truth of the factual assertions in the affidavit and determine only whether the affidavit is legally sufficient. See United States v. Azhocar, 581 F.2d 735, 739 (9th Cir. 1978), cert. denied, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979).

28 U.S.C. § 455 provides in part:

> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

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867 (9th Cir. 1980); United States v. Olander, 584 F.2d 876, 882 (9th Cir. 1978), vacated on other grounds sub nom. Harrington v. United States, 443 U.S. 914, 99 S.Ct. 3104, 61 L.Ed.2d 878 (1979). That test is whether "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." United States v. Winston, 613 F.2d 221, 222 (9th Cir. 1980). However, in evaluating a judge's impartiality where bias or prejudice is alleged, the bias or

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(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, ...

prejudice "must stem from an extra-judicial source." United States v. Azhocar, 581 F.2d 735, 739 (9th Cir. 1978), cert. denied, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979).

Most of Ronwin's specific allegations of bias or prejudice involve judicial acts which Judge Real either performed[12/] or failed to

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12/ Ronwin contends that Judge Real constantly interrupted him in his presentation of his case in another proceeding. Although the record in the other proceedings has not been filed, and thus it cannot be definitely determined whether the interruptions were justified, a judge is granted great deference in controlling the courtroom and the number of interruptions does not per se indicate extra-judicial prejudice. See United States v. IBM, 475 F.Supp. 1372 (S.D.N.Y. 1979), aff'd., 618 F.2d 923 (2nd Cir. 1980). Cf. Sibla, 624 F.2d at 869 (district court's characterization of defense theory as legally frivolous not indicative of prejudice).

perform.[11/]

Ronwin also contends that Judge Real is prejudiced against him because

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[11/]Ronwin contends that Judge Real failed to act in the following situations:

(1) When he tolerated deceit committed by a defendant in another action involving Ronwin;

(2) When he did not condemn defense counsel for slandering Ronwin and failed to order the record expunged;

(3) When he did not take action to discourage abuse directed at Ronwin by the district court clerk;

(4) When he showed a deference to anti-semitism by failing to condone Ronwin's actions against anti-semitism and in implying that only Jews can protest against anti-semitism;

(5) When he failed to rule immediately on Ronwin's affidavit of bias and

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Judge Real is a defendant in another action brought by Ronwin. However, [a] judge is not disqualified merely because a litigant sues or threatens to sue him."[14] United States v.

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prejudice; thus preventing Ronwin from pursuing discovery against defendants who were hindering discovery attempts; and

(6) When he refused to postpone the hearing date so as to allow Ronwin an opportunity to conduct discovery and to respond to the Bar's motion to dismiss.

None of these non-actions by Judge Real involves extra-judicial acts which would indicate, on their face, prejudice or bias. Moreover, adverse rulings by themselves do not constitute the requisite bias or prejudice. Azhocar, 581 F.2d at 738.

[14] Judge Real apparently became a defendant in an action brought by Ronwin after the instant action was assigned to Judge Real.

Grismore, 564 F.2d 929, 933 (10th Cir. 1977), cert. denied, 435 U.S. 954, 98 S.Ct. 1586, 55 L.Ed.2d 806 (1978). Such an easy method for obtaining disqualification should not be encouraged or allowed.

Finally, Ronwin contends that Judge Real's participation in ex parte communications with the Bar's counsel indicates the judge's prejudice against Ronwin. A judge is generally required to accept the truth of the factual assertions in an Affidavit of Bias filed pursuant to 28 U.S.C. § 144. Azhocar, 581 F.2d at 739. However, Ronwin's allegation of ex parte communication relates to facts that are peculiarly within the judge's

knowledge.[15] Given Judge Real's emphatic denial of Ronwin's allegations, and Ronwin's failure to show how such communications indicated the judge's prejudice except in the most general manner, Judge Real did not abuse his discretion by denying Ronwin's motion on this ground.

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[15] Ronwin's allegation of ex parte communication between Judge Real and the Bar's counsel is based on the fact that the Bar's counsel in setting a hearing date on the Bar's motion to dismiss knew when Judge Real would be in Phoenix. According to Ronwin, counsel could only have obtained that knowledge through ex parte communications with the Judge. The Bar's counsel explained, however, that he knew Judge Real would be in Phoenix on the day he suggested for a hearing in the instant case, because he had received an order from the court in another case assigned to Judge Real in which he was defense counsel (and Ronwin was plaintiff) setting the date suggested as the hearing date in that other case.

Sibla, 624 F.2d at 869 (applying abuse of discretion standard).

IV

CONCLUSION

We conclude that the district court erred in dismissing Ronwin's complaint pursuant to a Rule 12(b)(6) motion. We also conclude that the district judge did not abuse his discretion in refusing to recuse himself. AFFIRMED.

FERGUSON, Circuit Judge, dissenting:

It is hard to believe what the majority of the judges in this case have done.

It is now the law in this circuit that a person who has been found by the Supreme Court of the State of Arizona to be mentally unable to engage in the practice of law in the State of Arizona may still maintain a $1,200,000 damage action under the

federal antitrust laws against the State Bar of Arizona, the members of the Committee on Examinations and Admission of the Supreme Court of Arizona and their spouses, for refusing to permit him to compete as an attorney in the State of Arizona!

Precedents in this circuit and the Supreme Court mandate that when the board of bar examiners' grading procedures are challenged, such a challenge must be brought against the state supreme court as defendant. Moreover, because the action of the state supreme court is state action with the Parker exception, that action is immune to an antitrust attack. Further, the impact of the actions alleged by Ronwin are insubstantial and thus outside the antitrust laws. Consequently, I dissent from the

majority's conclusion that the antitrust laws apply to this bar examination matter.

I. CHALLENGE TO DENIAL OF BAR ADMISSION

A. Proper Defendant

A state's discretion over rules for admission to legal practice is vested in the judiciary, or the legislature. Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). In Hackin v. Lockwood, 361 F.2d 499 (9th Cir.), cert. denied, 385 U.S. 960, 87 S.Ct. 396, 17 L.Ed.2d 305 (1966), we held that the power to grant or deny admission to the bar is vested in the Arizona Supreme Court. Hence, the State Committee on Examinations and Admission was not a proper defendant because it was merely

a committee of the Arizona Supreme Court with powers delegated by the court. Id. at 500.

In Hackin, plaintiff, the graduate of an unaccredited law school, could not take the bar because a state bar rule allowed only graduates of accredited law schools to take the bar. Plaintiff sued the justices of the Arizona Supreme Court, the State Bar of Arizona, and the Committee on Examinations and Admissions. In holding that the state bar and the Committee on Examinations and Admissions were improper defendants, the court explained:

> The State Bar of Arizona is not an appropriate party to the suit because it cannot promulgate or change the rules governing admission to practice in Arizona. Its Board of Governors can suggest rules to the Arizona

> Supreme Court, and can enforce them, but only with the approval of the Arizona Supreme Court....
>
> In the original complaint, but not in the amended complaint, appellant named as a defendant the "Committee on Examinations and Admissions," presumably of the State Bar. This is not a committee of the State Bar, but a committee named by the Supreme Court of Arizona, made up of members of the Arizona State Bar, Rule 28(a). Thus we find the power to grant or deny admission is vested solely in the Arizona Supreme Court....

361 F.2d at 499 (9th Cir. 1966).

Considering a similar admissions procedure, the court reiterated this conclusion in Chaney v. State Bar of California, 386 F.2d 962 (9th Cir. 1977), cert. denied, 390 U.S. 1011, 88 S.Ct. 1262, 20 L.Ed.2d 162 (1968). In that case, we held that the refusal of the State Bar Committee to certify an applicant was not a terminative step

in the admissions process. Because final decision is vested in the state supreme court, the committee's decision not to admit had no "fixative" status until the court approved or rejected the committee's recommendation. Id. at 966. Once a decision is final, the supreme court is the proper defendant when a party complains about examination procedures. The Committee of Bar Examiners cannot be a party because it is merely an arm of the state supreme court "for the purposes of assisting in matters of admission ...," which matters remain ultimately in the court. Id. If the plaintiff is deprived of a right, it is the state supreme court, not the Committee on Examinations and Admissions, that is the source of the deprivation.

These decisions were reaffirmed in Brown v. Board of Bar Examiners, 623 F.2d 605 (9th Cir. 1980). The Bar Examiners of Nevada were found to be an improper party for the reason articulated in Hackin and reemphasized in Chaney.[1/] Id. at 608. See also

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[1/] In Brown, a graduate of an unaccredited law school sued the Nevada Supreme Court, State Bar, and Board of Bar Examiners to allow her to sit for the bar. The district court dismissed the State Bar and the Board of Bar Examiners as improper parties under Hackin, yet issued an injunction against them. 623 F.2d at 608. In allowing the bar and the board to appeal, the court of appeals explained:

> We see no logic in the district court's novel rulings which currently dismissed appellants and yet granted specific relief against them. Whatever the rationale, however, appellants should not be denied appellate review of orders by which they are aggrieved.

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Whitfield v. Illinois Board of Law Examiners, 504 F.2d 474 (7th Cir. 1974)(reaching similar conclusion). Accordingly, Ronwin cannot sue the Arizona State Bar Examiners.

(Continued from previous page) Id. Clearly, the court allowed the two parties to appeal because they were aggrieved. In dictum, the court said that Hackin, involving a challenge to the validity of a state supreme court rule governing admission to the bar, did not apply to make the state bar and the board improper defendants, since these were the only parties who could "physically comply" with an injunction requiring the defendants to let the plaintiff sit for the bar. Id. at 608 & 608 n.6. Even assuming the correctness of that dictum, it has no application to this case. Ronwin complains not of the failure of the state bar to seat him for the exam--he failed it--but of the failure of the supreme court to admit him. Admission to the bar is within the province of the supreme court, not the state bar, nor the committee.

B. Limitations on Challenges

Court review of state procedures for admission and testing is guided by the rational basis standard. Chaney v. State Bar, supra, at 964; Tyler v. Vickery, 517 F.2d 1089, 1099 (5th Cir. 1975), cert. denied, 426 U.S. 940, 96 S.Ct. 2660, 49 L.Ed.2d 393 (1976).[1/]

[1/] A variety of discretionary practices have been sanctioned by the courts. Statutes permitting admission without examination are valid. Shenfield v. Prather, 387 F.Supp. 676 (N.D.Miss. 1974). A state may validly require an applicant to pass an examination in essay form. Chaney v. State Bar, supra. A state may allow state graduates to waive examination without denying equal protection to other applicants. Huffman v. Montana Supreme Court, 372 F.Supp. 1175 (D.C.Mont.), aff'd, 419 U.S. 955, 95 S.Ct. 216, 42 L.Ed.2d 172 (1974). A board of bar examiners may validly meet to review borderline failure after all scores are tabulated. Hooban v. Board of Governors of Washington State Bar Ass'n, 85 Wash.2d 774, 539 P.2d 686, app. dism'd, 424 U.S. 902, 96 S.Ct. 1092, 47 L.Ed.2d 306 (1976). Subjective grading by examiner is allowed. Tyler v. Vickery, supra.

While the discretion granted to states and bar examiners is broad, the opportunity to practice law is protected by the due process and equal protection clauses of the fourteenth amendment. Willner v. Committee on Character & Fitness, 373 U.S. 96, 102, 83 S.Ct. 1175, 1179, 10 L.Ed.2d 224 (1963). Brown v. Board of Bar Examiners, supra, established a definite procedure for challenging admission practices. Noting that admission procedures are purely a matter of local concern, Brown stated, "The only constraints on the states' exclusive jurisdiction are constitutional in nature...." 623 F.2d at 609.

Brown outlined the alternatives available to an unsuccessful applicant:

Since federal courts are granted jurisdiction under 28 U.S.C. § 1343 to vindicate constitutional rights, an issue arises as to the extent of a federal court's authority to participate in what is primarily a state concern. A dichotomy has developed between two kinds of constitutional attack which might be pursued by an unsuccessful bar applicant: "The first is a constitutional challenge to the state's general rules and regulations governing admission; the second is a claim, based on constitutional or other grounds, that the state has unlawfully denied a particular applicant admission." Doe v. Pringle, 550 F.2d 596, 597 (10th Cir. 1976), cert. denied, 431 U.S. 916, 97 S.ct. 2197, 53 L.Ed.2d 227 (1977).

In the first type of attack, federal district courts may assert jurisdiction under § 1343 to ensure that generally applicable rules or procedures do not impinge on constitutionally protected rights. Federal courts have frequently entertained challenges to rules controlling admission to the

bar, and have almost without exception sustained the validity of such rules. [Citations omitted].

On the other hand, a state court's decision on an individual application may not be disturbed in an original suit in federal district court. "[O]rders of a state court relating to the admission, discipline, and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to the state court ...." Mackay v. Nesbet, 412 F.2d 846 (9th Cir.), cert. denied, 396 U.S. 960, 90 S.Ct. 435, 24 L.Ed.2d 425 (1969). In exercising its judgment on an individual petition, a state supreme court performs a judicial act, In re Summers, 325 U.S. 561, 65 S.Ct. 1307, 89 L.Ed. 1795 (1945), reviewable in the Supreme Court. See Schware v. Board of Bar Examiners, supra, 353 U.S. at 238, 77 S.Ct. at 755; Konigsberg v. State Bar of California, 353 U.S. 252, 258, 77 S.Ct. 722, 725, 1 L.Ed.2d 810 (1957). A federal district court, in contrast, does not sit as an appellate court and therefore lacks jurisdiction to review

> state court actions denying admission to the bar, even though the denial allegedly involves deprivation of constitutional rights.

Brown, supra, at 609-10 (citations omitted). The plaintiff in Brown attempted the only viable challenge to state bar admission procedures--a constitutional challenge. Brown denied jurisdiction because the plaintiff presented a claim of individual constitutional deprivation and the prayer for relief sought individual redress including monetary damages. Hence, the court found that the claim was not cognizable in district court. Brown, supra, at 611.

C. The Majority Opinion

The opinion disregards the tradition of deference to state discretion in admission procedures. Because such deference has never existed toward the

state's ability to regulate fees, the majority's reliance on Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), is misplaced. Further, the opinion creates an antitrust cause of action where the only challenge that might be appropriate is a constitutional one. Brown, 623 F.2d at 609. Finally, Brown held that a federal district court does not have jurisdiction over a claim against bar examiners because the state court is the real party in interest in admissions cases. In addition, jurisdiction is allowed only where the suit alleges arbitrary and capricious procedures violative of due process. 623 F.2d at 610. However, the qualifications for admission in Arizona are "nearly identical" to

those unsuccessfully challenged in Brown. Id. at 610, n.9. Because Ronwin has sued the wrong defendant and because his suit raised no constitutional challenge to admission procedures, binding precedent requires that the district court's dismissal be affirmed.

II. THE ANTITRUST EXEMPTION

The Parker antitrust exemption is grounded on our federal system:

> In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Parker v. Brown, 317 U.S. 341, 351, 63 S.Ct. 307, 313, 87 L.Ed. 315 (1943). The unfortunate effect of the majority

opinion is to attribute to the Sherman Act a congressional intent to limit a state's control over bar admissions.

The proposition for which National League of Cities v. Usery, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), stands, namely, that federal interference should not extend to essential state functions, should be applicable to both antitrust and commerce clause cases. See Lafayette v. Louisiana Power & Light Co., 434 U.S. 389, 423, 430, 98 S.Ct. 1123, 1142, 1145, 55 L.Ed.2d 364 (1977)(Burger, C. J., concurring in Part I of the Court's opinion and in the judgment; Stewart, J. dissenting). I would think that regulation of bar admissions is an "integral operation in the area of traditional government functions."

See id. at 424, 98 S.Ct. at 1142. For that very reason, the Arizona Supreme Court oversees bar admissions and delegates authority to its agent; the state must have regulatory authority to examine the fitness and competence of bar applicants. If the state's agents abuse their authority, the proper remedy is a constitutional attack, not an antitrust attack that will undermine the authority that states qua states have to regulate bar admissions.

The majority applies erroneous standards to determine whether an agency is exempt from antitrust laws. The opinion distinguishes Ronwin's complaint from that in Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), with the conclusion that "here: (1) a state

agency, as opposed to the state policy maker, was committing the alleged anticompetitive act; and, more importantly, (2) the alleged anticompetitive act did not fulfill a clearly articulated state policy." Both of these conclusions are incorrect.

As to the first characterization, Hackin, Chaney, and Brown held that the grading of law boards by a board of bar examiners is within the powers delegated by the supreme court--the state policymaker. Hence, the Ninth Circuit thrice reiterated that the supreme court is the proper party when grading decisions are challenged. The majority opinion ignores that statement.

The second characterization is also unfounded. An articulated state

policy of grading examinations and admitting attorneys to the bar is achieved by the board's grading procedures. The directive of California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980), that the challenged restraint be clearly articulated and affirmatively expressed as state policy and supervised by the state is met in a two-fold fashion. First, the Arizona Supreme Court has authorized the Board of Bar Examiners to grade examinations for admission. Second, this circuit has defined such matters to be within the power and control of the Supreme Court of Arizona, the proper defendant in admissions cases.

While the Midcal tests apply to this case, the Midcal facts are easily

distinguishable. In Midcal, the California wine price maintenance scheme was not actively supervised by the state. The state simply authorized private producers or wholesalers to fix prices and then enforced the prices set by the private parties in the event of a violation. In Ronwin, however, the Arizona Supreme Court has delegated certain duties to the Committee on Bar Examinations, and, as in California, see Chaney, supra, the Arizona committee acts as a mere instrumentality of the supreme court. Moreover, recommendations of the committee to the supreme court are merely advisory. Exercising its independent judgment, the state supreme court itself accepts or denies each and every recommendation by the

committee. By passing on every bar application, the state supreme court ratifies and adopts the very system that it has authorized.

The majority's reliance on Goldfarb v. Virginia State Bar, supra, is inappropriate. In that case, the state supreme court had not only made no reference to fees but it had also warned against exclusive reliance on such fees in an ethical code. 421 U.S. at 789, 95 S.Ct. at 2014. The county bar was a voluntary association which promulgated the fee schedule as "private anticompetitive activity" independent of the contrary to the suggestion of the Virginia Supreme Court. Id. at 792, 95 S.Ct. at 2015-16. The Court states: The threshold inquiry in determining if an anticompetitive action is State action ... is whether the activity is

required by the state acting as sovereign. Parker v. Brown, 317 U.S. [341,] 350-352, 63 S.Ct. 307 [at 313-314], 87 L.Ed. 315 [1943]." 421 U.S. at 790. For an exemption to apply, "anticompetitive activities must be compelled by the direction of the State acting as sovereign." Id. at 791, 95 S.Ct. at 2015.

The majority relies on Goldfarb rather than Bates as analogous to the instant case. Though neither Goldfarb nor Bates is exact replica of the case at hand, Bates is more directly on point. Goldfarb would be analogous if, in the instant case, the Arizona Supreme Court had rejected the Board of Bar Examiners' procedures; the state supreme court in Goldfarb had warned the state bar against enforcing the challenged fee schedules. In

contrast, the Arizona Supreme Court approved the procedures challenged here by accepting recommendations for admission based on those procedures. This implied validation of the board's grading system renders Bates the more direct and proper analogy.

In Goldfarb, the alleged anticompetitive activity was the promulgation of a fee schedule by the state bar. The schedule was expressly disclaimed by the state supreme court. The anticompetitive illegal result was that it involved price-fixing. In Bates, the activity of the state bar was to enforce a prohibition against advertising. There, the state bar was immune because the supreme court had promulgated the rule. The alleged anticompetitive result was to

monopolize. In Ronwin, the challenged activity is the grading of examinations on a curve. The state supreme court has entrusted the grading of examinations to the state bar. The alleged anticompetitive result is artificially to limit the number of attorneys and thereby to monopolize. The opinion erroneously subjects the state bar to antitrust laws by focusing on the alleged result and ignoring the immunity issue decided in Bates.

III. ALLEGED IMPACT ON COMMERCE

In order to prevail in an antitrust suit, a party must demonstrate an effect on commerce which is "more than trivial" in the relevant market. Gough v. Rossmoor Corp., 585 F.2d 381, 389 (9th Cir. 178), cert. denied, 440

U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979). Ronwin's complaint neither identifies a relevant market nor alleges a substantial impact on such a market. A court should give a party the opportunity to demonstrate the elements of his case if his claim presents the possibility that he may prove substantial impact. However, on the facts of this case, Ronwin could not demonstrate more than the trivial impact of a curved grading system. The ability of applicants to reapply permits them to remain within the potential commerce stream.

In addition, the opinion relies on McLain v. Real Estate Board, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980), for the proposition that Ronwin could "conceivably" demonstrate impact on the relevant market. The

relevant market in this case, however, while not defined before the district court, is a broad and diffuse market that is not analogous to the well-defined property market in New Orleans with a specific percentage of out-of-state contractors. Without more, the conclusion of a conceivable impact in Ronwin does not flow from the facts of McLain.

CONCLUSION

For the foregoing reasons, I dissent.

Edward RONWIN, Plaintiff-Appellant,

v.

STATE BAR OF ARIZONA, Carlock, George Read and Wanda Myers, Robert D. and Judith Wolfinger, Harold J. and Jane Doe Richmond, James L. and Jane Doe Karman, Howard H. and Jane Doe Hoover, Charles R. and Jane Doe, Defendants-Appellees.*/

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*/ (Petitioners' footnote) The caption reflects a clerical error by the Court of Appeals. In the District Court, Ronwin sued the State Bar of Arizona; George Read Carlock and Wanda Carlock, Husband and Wife; Robert D. Myers and Judith Myers, Husband and Wife; Harold J. Wolfinger and Jane Doe Wolfinger, Husband and Wife; James L. Richmond and Jane Doe Richmond, Husband and Wife; D. Thompson Slutes and Jane Doe Slutes, Husband and Wife; Howard H. Karman and Jane Doe Karman, Husband and Wife; and Charles R. Hoover and Jane Doe Hoover, Husband and Wife, all of whom were appellees in the Court of Appeals.

No. 80-5004.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted April 16, 1981.

Decided Dec. 14, 1981.

As Amended on Rehearing Sept. 8, 1982.

Rehearing and Rehearing En Banc

Denied Dec. 2, 1982

Appeal from the United States District Court for the District of Arizona.

Before FERGUSON and BOOCHEVER, Circuit Judges, and HATTER,**/

HATTER, District Judge:

Ronwin sued the Arizona State Bar ("Bar") and the individual members (and their spouses) of the Committee

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**/ The Honorable Terry J. Hatter, Jr., United States District Judge for the Central District of California, sitting by designation.

on Examinations and Admissions of the Arizona Supreme Court ("Committee"), alleging that they had violated federal antitrust laws in grading the 1974 Arizona bar examination that Ronwin failed. The district court denied Ronwin's motion for recusal and dismissed the action for failure to state a claim, lack of jurisdiction, and lack of standing. We affirm the denial of the recusal motion, but reverse the dismissal decision as to the individual committee members[1/] and remand for further proceedings.

[1/] Although the Committee is appointed by the Arizona Supreme Court from a list of nominees chosen by the Bar's Board of Governors, it is not, as such, a committee of the State Bar. Because no specific allegations of wrongdoing have been made against the Bar, the dismissal for failure to state a claim was proper as to the Bar. For the same reason, we affirm the dismissal as to the spouses of the individual committee members.

I

FACTS

Ronwin took the Arizona bar examination in February, 1974. He was notified two months later that he had failed the examination. The Arizona Supreme Court refused to review his exam, and the United States Supreme Court denied certiorari. See Ronwin v. Committee on Examination and Admissions, 419 U.S. 967, 95 S.Ct. 231, 42 L.Ed.2d 183 (1974).[1/]

[1/] Ronwin applied to retake the bar examination in July, 1974, but was denied permission because the Committee declined to certify that he was "mentally and physically able to engage in active and continuous practice of law." See Ariz.Sup.Ct.R. 28(c)(IV)(5). A special committee conducted a formal hearing regarding the allegations of mental unfitness under Ariz.Sup.Ct.R. 28(c)(XII)(D). After holding a hearing, this special committee declined to find Ronwin

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Ronwin filed this antitrust action in March, 1978, alleging that defendants violated section 1 of the Sherman Act, 15 U.S.C. § 1, by illegally restricting competition among attorneys practicing in Arizona. The essence of Ronwin's complaint is that the Committee graded the exam to admit a predetermined number of persons, without reference to "achievement by each bar applicant of a pre-set standard [of competence]." For purposes of their motion to dismiss, defendants did not

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(Continued from previous page) mentally fit to practice law. The finding of unfitness was affirmed by the Arizona Supreme Court. Application of Ronwin, 113 Ariz. 357, 555 P.2d 315 (1976), cert. denied, 430 U.S. 907, 97 S.Ct. 1178, 51 L.Ed.2d 583 (1977).

challenge the accuracy of Ronwin's allegations.[3/]

At the time Ronwin took the bar exam, the Committee was authorized to determine whether bar applicants possessed the "necessary qualifications and . . . fulfill[ed] the requirements prescribed by the [Bar] board of governors as approved by [the Arizona Supreme Court] . . . ." Ariz.Sup.Ct. Rule 28(a)(1973) (amended in 1975 to create two separate committees). The Committee consists

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3/ On remand, however, it may be necessary to determine the manner in which the 1974 examination was graded. Specifically, the court should determine whether the examination was graded as Ronwin alleges, or was graded on a different basis, such as a "scaled" formula, designed to equalize the difficulty of the exam over various years with the pass-fail determination being based on individual merit rather than numerical quota.

of seven active members of the State Bar who, upon the recommendation of the Bar's Board of Governors, are appointed by the Arizona Supreme Court. Id. As Ronwin noted in paragraph II of his complaint, the State Bar is a private entity to which all Arizona lawyers belong, and the individual defendants were members of "the Committee . . . and, as such, presided over and conducted the process by which applicants for membership in [the] Bar were examined. . . ."

II

DISMISSAL OF RONWIN'S ACTION

The district court gave three reasons for dismissing the action: (1) the complaint failed to state a claim upon which relief could be granted;

(2) the court lacked jurisdiction over the subject matter; and (3) Ronwin lacked standing to seek the relief requested. These reasons will be discussed seriatim.

A. Failure to State a Claim--State-Action Immunity

The district court's ruling that Ronwin had failed to state a claim was apparently based on its acceptance of defendants' argument that bar grading procedures are immune from federal antitrust laws. Relying primarily on Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), the defendants argue that, even assuming, arguendo, the grading formula was anticompetitive, the Committee's status as a state agent renders its actions absolutely immune from antitrust liability. We disagree.

In Bates, the Supreme Court held that a disciplinary rule adopted by the Arizona Supreme Court and enforced by the Arizona state bar, which prohibited lawyers from advertising, did not violate the federal antitrust laws under the state-action exemption first announced in Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). 433 U.S. at 359-61, 97 S.Ct. at 2696-97. The Court stressed that the real party in interest was the Arizona Supreme Court because it had adopted the challenged restraint. Because the challenged restraint had been specifically adopted by the state acting, through the State Supreme Court, as sovereign, it therefore reflected a clear and affirmative articulation of state policy. Id. at 361-62, 97 S.Ct. at 2697-98. In the

present case, by contrast, the challenged restraint was not adopted or directly authorized by the Arizona Supreme Court.

In a more analogous case, the Supreme Court held that the activities of a county and a state bar association in publishing and enforcing a minimum-fee schedule were not shielded by the state-action exemption. Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-92, 95 S.Ct. 2004, 2013-15, 44 L.Ed.2d 572 (1975). The Court stated:

> The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman act was not meant to proscribe is whether the activity is required by the State acting as sovereign. Parker v. Brown, 317 U.S. at 350-352 [63 S.Ct. at 313-14]; Continental Co. v. Union Carbide, 370 U.S. 690, 706-07 [82 S.Ct. 1404, 1414-15, 8

> L.Ed.2d 777] (1962). Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent. Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees, leaving regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or require the type of price floor which arose from respondents' activities. . . . It is not enough that, as the County Bar puts it, anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.

Id. at 790-91, 95 S.Ct. at 2014-15.

Subsequent Supreme Court decisions underscore the distinction between Bates and Goldfarb. The Court has repeatedly emphasized in these more

recent decisions that for the state-action exemption to apply the challenged restraint must be clearly articulated and affirmatively expressed as state policy and be actively supervised by the state itself. See, e.g., City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410-13, 98 S.Ct. 1123, 1135-36, 55 L.Ed.2d 364 (1978); New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96, 109, 99 S.Ct. 403, 411, 58 L.Ed.2d 361 (1978); California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980); Community Communications Co. v. City of Boulder, 455 U.S. 40, 48-51, 102 S.Ct. 835, 839-41, 70 L.Ed.2d 810 (1982). The failure to meet either requirement precludes application of the antitrust

immunity. Midcal, 445 U.S. at 105, 100 S.Ct. at 943.

Viewing the present case at this stage of the proceedings in light of the Court's state-action requirements, we conclude that the challenged grading procedure fails to qualify for antitrust immunity. It has not been established that the alleged restraint was "clearly articulated and affirmatively expressed as state policy." Midcal's first requirement. Id. Like the defendants in Goldfarb, the defendants here have no statute or Supreme Court Rule to point to as directly requiring the challenged grading procedure.[4/] See 421 U.S. at 790-91, 95 S.Ct. at 2014-15.

[4/] The challenged policies in Benson v. Arizona State Board of Dental Examiners, 673 F.2d 272, 275-76 (9th Cir. 1982) (as amended), in contrast to this case, were explicitly mandated by statute.

The fact that the Arizona Supreme Court has delegated to the Committee the general authority to examine applicants to determine if they are qualified to practice law and reviews the Committee's recommendations regarding admission does not alone clothe the Committee's unilateral grading policies with blanket immunity from the antitrust laws. "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement" over actions of the Committee that were not affirmatively expressed as state policy by the Arizona court. Midcal, 445 U.S. at 106, 100 S.Ct. at 943. As the Court emphasized in Goldfarb, "[i]t is not enough that, as the . . . Bar puts it, anticompetitive conduct is 'prompted'

by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." 421 U.S. at 791, 95 S.Ct. at 2015. Accord, Phonetele, Inc. v. American Telephone and Telegraph Co., 664 F.2d 716, 736 (9th Cir. 1981).

The fact that the Committee was established by Supreme Court Rule and composed of members selected from the Bar by the Arizona Supreme Court is not, as defendants assert, dispositive in itself of the state-action question.[5/] Although the defendants

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[5/] As in City of Boulder and City of Lafayette, "[t]his case's preliminary posture makes it unnecessary for us to consider other issues regarding the applicability of the antitrust laws in the context of suits by private litigants against government defendants . . . [or to]
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in the United States Supreme Court's state-action decisions were public bodies, or subdivisions of the state, that did not end the Court's analysis. The Court still looked to see whether the challenged restraints were clearly articulated and affirmatively expressed as state policy and were actively supervised by the state acting as sovereign. Thus, for instance, it was not dispositive that the restraints challenged in Parker, Orrin W. Fox, and Midcal were enforced, respectively, by a state commission, a state board, and a state department. 317 U.S. at 344, 63 S.Ct.

(Continued from previous page) confront the issue of remedies appropriate against [public] officials." City of Boulder, 455 U.S. at 56 n.20, 102 S.Ct. at 843 n.20. Accord, City of Lafayette, 435 U.S. at 401-02, 98 S.Ct. at 1130-31.

at 310; 439 U.S. at 103, 99 S.Ct. at 408; 445 U.S. at 100, 100 S.Ct. at 940. In City of Lafayette, 435 U.S. at 408, 98 S.Ct. at 1134, a plurality of the Court expressly rejected the argument that the state-action exemption extends to "all governmental entities, whether state agencies or subdivisions of a State . . . simply by reason of their status as such." This position has since been adopted by a majority of the Court. See City of Boulder, ____ U.S. at _____, 102 S.Ct. at 842.

The question remains whether the challenged restraint allegedly fashioned by the Committee was sufficiently "articulated" and "supervised" by the Arizona Supreme Court. Standing alone, the fact that the court established the Committee

and selected its members does not affect the reasoning underlying our conclusion that the challenged grading procedure was not clearly articulated and affirmatively expressed as state policy, Midcal's first requirement.

Effective January 15, 1974, 45 days before the examination Ronwin failed, the Arizona Supreme Court adopted Rule 28(c)(VII) (B) which requires the Committee to file its proposed grading formula with the Supreme Court at least 30 days before each examination. This review procedure was not brought to the attention of the district court either in the pleadings or in the papers pertaining to the motion to dismiss; nor did the parties mention it in their briefs or arguments to this court.

Defendants contend for the first time on rehearing that the Committee's grading formula "was submitted to the Court, reviewed by the Court, and accepted by the Court." In response, Ronwin has tendered to this court what purports to be the letter the Committee filed with the Supreme Court on February 8, 1974 pursuant to Rule 28(c)(VII)(B). If, as Ronwin alleges, the Committee scored the examination to admit a pre-determined number of applicants, the letter does not so advise the court. Accordingly, if the letter presented to us constitutes the submission to the Supreme Court, it cannot be the basis for a clearly articulated and affirmatively expressed state policy. Although dismissal might have been proper if the facts were as defendants now argue

for the first time on rehearing, those facts were never brought to the district court's attention. Dismissal was therefore improper on the basis of the information before the district court.

Our resolution of the state-action issue is not inconsistent with this court's prior decisions in Hackin v. Lockwood, 361 F.2d 499 (9th Cir. 1966); Chaney v. State Bar of California, 386 F.2d 962 (9th Cir. 1967), cert. denied, 390 U.S. 1011, 88 S.Ct. 1262, 20 L.Ed.2d 162 (1968); and Brown v. Board of Bar Examiners, 623 F.2d 605 (9th Cir. 1980). Those decisions do not support the contention that bar grading procedures are always shielded by state-action immunity, that such procedures may be challenged only on constitutional

grounds, or that the Arizona Supreme Court was the proper defendant in this case. Those cases did not involve antitrust challenges to bar grading procedures. The plaintiffs in all three cases based their claims on alleged violations of their individual constitutional rights.[1/]

[1/] The statement in Brown that "the only constraints on the states' exclusive jurisdiction [over bar admission matters] are constitutional in nature . . .," 623 F.2d at 609, refers to § 1343 actions like those at issue in Brown, Hacking, and Chaney because, as the Brown court notes in the very next sentence: "federal courts are granted jurisdiction under 28 U.S.C. § 1343 to vindicate [only] constitutional rights." This jurisdictional limitation stems from the express language of § 1343, not from the fact that the plaintiff was challenging a bar admission policy. One need look no farther than Goldfarb, where the Court held that the minimum-fee schedule enforced by the state bar violated § 1 of the

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The national policy in favor of competition, Midcal, 445 U.S. at 106, 100 S.Ct. at 943, should not be

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Sherman Act, to see that Ronwin's complaint established subject-matter jurisdiction under Federal antitrust laws.

Similarly, a careful reading of the three decisions reveals that they do not hold that a state supreme court is the only proper defendant in challenges to bar grading procedures. As the court explained in Brown, the state supreme court is the proper party when it has promulgated the specific challenged rule. 623 F.2d at 608 n.6.

In Hackin, as the Brown court noted, the court emphasized that the admission rule at issue, barring graduates of unaccredited law schools from taking the bar exam, was directly promulgated and enforced by the state supreme court. 361 F.2d at 500-01. In Chaney, the court's discussion clearly concerns finality and the nature of the plaintiff's claim, and has no relevance to the issues of state action or proper parties. See 386 F.2d at 966-67. It should also be noted that the Chaney court discusses
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thwarted absent a clear articulation by the Arizona Supreme Court that it had adopted the alleged grading policy. Absent such a declaration, Ronwin should not have been denied the opportunity to prove that the grading policy was designed to limit competition among Arizona attorneys, as opposed to being designed to ensure that attorneys had the necessary qualifications. Thus, Ronwin's action should not have been dismissed on the ground that the defendants enjoy absolute state-action immunity.

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the plaintiff's restraint of trade contention (similar to Ronwin's claim) at length, and rejects it on factual rather than jurisdictional grounds. Id. at 965. Thus, these decisions offer no support for the contention that there is a blanket rule making state supreme courts the only proper defendants in all bar admissions cases.

B. Subject Matter Jurisdiction--Interstate Commerce

The Sherman Act's requirement of interstate commerce, 15 U.S.C. § 1, is jurisdictional. See Western Waste Service Systems v. Universal Waste Control, 616 F.2d 1094, 1097 (9th Cir.), cert. denied, 449 U.S. 869, 101 S.Ct. 205, 66 L.Ed.2d 88 (1980); see generally McLain v. Real Estate Board, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980). The district court evidently found that the alleged restraint did not affect interstate commerce so as to invoke jurisdiction under the Sherman Act. Defendants contend that the jurisdictional requirement of the Sherman Act was not satisfied by Ronwin's complaint because bar admission is a purely local matter. Ronwin responds that

the services of Arizona lawyers are required by people living outside Arizona. The price paid by these out-of-state clients for legal services performed by Arizona lawyers is, according to Ronwin, higher than it would be if the number of Arizona lawyers had not been artificially restricted.

In order to establish jurisdiction under the antitrust laws, a plaintiff must establish that the defendant's activity either (1) is itself in commerce or (2) "has an effect on some other appreciable activity demonstrably in interstate commerce." McLain, 444 U.S. at 242, 100 S.Ct. at 509 (emphasis added). Because of the past confusion surrounding these tests, we will consider Ronwin's allegations of interstate commerce

under both the "in commerce" and the "effect on commerce" tests. See Bain v. Henderson, 621 F.2d 959, 960 n.1 (9th Cir. 1980).

(1) The "in commerce" test: The most applicable Supreme Court decision applying the "in commerce" test is Goldfarb v. Virginia State Bar, 421 U.S. at 783-86, 95 S.Ct. at 2011-12. In Goldfarb, plaintiffs alleged that the Virginia State Bar was fixing the prices charged by lawyers handling real estate transactions. In upholding jurisdiction, the Court noted that the real estate transactions that require legal services are frequently interstate transactions. 421 U.S. at 783-84, 95 S.Ct. at 2011-12. The Court reasoned that any restraint on those services therefore had a substantial effect on

interstate commerce. Id. at 785, 95 S.Ct. at 2012.

Ronwin did not specifically plead which interstate transactions require legal services. See Bain, 621 F.2d at 961. Nor did he indicate how substantial an effect on interstate commerce results from restricting the number of lawyers practicing in Arizona. It is not inconceivable, however, that he could establish that legal services constitute an indispensable and inseparable component of certain interstate transactions. Therefore, the district court erred in dismissing the complaint for that reason at this stage of the proceedings. See McLain, 444 U.S. at 246, 100 S.Ct. at 511 (a complaint should not be dismissed unless it appears beyond doubt that

the plaintiff can prove no set of facts that would entitle him to relief).

(2) The "effect on commerce" test: In McLain, plaintiffs charged that various New Orleans-based real estate brokers were engaged in a price-fixing conspiracy. The Court held that plaintiffs had alleged facts sufficient to show that defendants' conduct affected interstate commerce.[7/] McLain, 444 U.S. at 245, 100 S.Ct. at 510. Specifically, the Court noted indications in the record that: (1) "an appreciable

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7/ The Court specifically stated that a party need only show that a defendant's general business, as opposed to the alleged illegal conduct, affected interstate commerce in order to meet the jurisdictional requirement. McLain, 444 U.S. 242, 100 S.Ct. at 509.

amount of commerce [was] involved in the financing of residential property in the Greater New Orleans area" and the commerce involved various interstate institutions, id. at 245, 100 S.Ct. at 510; and (2) the activities of the real estate brokers, by affecting the terms and frequency of local real estate transactions, could have a "not insubstantial effect on interstate commerce." Id. at 246, 100 S.Ct. at 511.

Ronwin did not allege either that there are an appreciable number of interstate transactions taking place in Arizona that require legal services or that limiting the number of lawyers has a not insubstantial effect on the number or size of these transactions. However, as is also true under the "in commerce" test, it is not inconceivable

that Ronwin could establish jurisdiction under the "effect on commerce" test. See, e.g., McLain, 444 U.S. at 245-47, 100 S.Ct. at 510-11; Western Waste Service, 616 F.2d at 1097-99. Therefore, on remand, the district court should give Ronwin the opportunity to prove that his complaint meets the jurisdictional requirements under either of these tests.

C. Standing

In order to have standing to maintain a private antitrust action, a party must allege injury to the party's business or property occurring by reason of the alleged antitrust violation. 15 U.S.C. § 15; Solinger v. A&M Records, Inc., 586 F.2d 1304, 1309 (9th Cir. 1978), cert. denied, 441 U.S. 908, 99 S.Ct. 1999, 60

L.Ed.2d 377 (1979). Defendants contend that even if they committed an antitrust violation, the violation did not cause Ronwin injury because he was subsequently found mentally unfit to engage in the practice of law. Thus, according to defendants, even if Ronwin had passed the exam, he would not have been admitted to practice in Arizona.

The flaw in the defendants' argument is that Ronwin was not found mentally unfit to practice law by the Arizona Supreme Court until July of 1976, twenty-seven months after Ronwin's exam results were released.[1/]

[1/] Although the Committee on Examinations and Admissions declined to certify that Ronwin was "mentally fit" to practice law when he applied to retake the bar exam in July, 1974, (Continued on next page)

If Ronwin had passed the exam, he arguably would have been able to practice law until he was found, by final decision, to be mentally unfit. Because defendants' alleged illegal restraint precluded Ronwin from practicing law in Arizona for an appreciable period of time, Ronwin has sufficiently alleged that he was injured by reason of an unlawful

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and the special committee appointed by the Arizona Supreme court upheld that determination on January 21, 1975, it was not until July, 1976 that the Arizona Supreme Court affirmed the finding. Application of Ronwin, 113 Ariz. 357, 555 P.2d 315 (1976), cert. denied, 430 U.S. 907, 97 S.Ct. 1178, 51 L.Ed.2d 583 (1977). Defendants do not contend either that Ronwin would have been denied admission in 1974 because of his alleged unfitness to practice had he passed the exam or that he would not have been allowed to practice law pending the Arizona's court decision on the matter. It would be inappropriate for this court to speculate on the matter.

practice. See Kapp v. National Football League, 586 F.2d 644, 648 (9th Cir. 1978), cert. denied, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979). Cf. Solinger, 586 F.2d at 1311 (prospective purchaser of company has standing to sue companies that allegedly foreclosed his ability to enter market). Although his allegations of damages suffice to confer standing, Ronwin will still have to prove that defendants' actions caused him actual damages in order to recover.[1/]

[1/] Assuming that Ronwin is able to clear the various hurdles still before him, it may be necessary to determine whether he would have passed the bar examination if graded on a proper basis. If the 1974 bar exam may still be impartially regraded to ascertain whether Ronwin would have received a passing grade, but for the alleged

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III

THE RECUSAL QUESTION

Ronwin appeals the denial of his recusal motion. The district judge was also presiding at that time over other actions in which Ronwin was a

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(Continued from previous page) improper method of restricting bar admission, the district court may so order and supervise such a procedure for the sole purpose of determining whether Ronwin has been damaged. If the court decides that such a remedy is no longer feasible under the circumstances of this case, it would be justified in presuming that he would have passed for the purpose of ascertaining damages, if any. The amount of damages would be limited to Ronwin's loss of earnings, between April, 1974 when he would have been admitted to the Bar, and July, 1976, when the Arizona Supreme Court found him unfit to practice law. See Murphy Tugboat Co. v. Crowley, 658 F.2d 1256, 1260 (9th Cir. 1981) (special solicitude for proof of damages when defendant's conduct has been a factor in speculative nature of damages), cert. denied, ____ U.S. ____, 102 S.Ct. 1713, 72 L.Ed.2d 135 (1982).

party. Ronwin set forth, in various affidavits and motions, facts which he contends indicated that the judge was biased and prejudiced against him. He contends that the judge was therefore required to recuse himself pursuant to 28 U.S.C. §§ 144 and 455.[10/]

[10/] 28 U.S.C. § 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the

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The test for disqualification is the same under sections 144 and 455(b)(1). United States v. Sibla, 624 F.2d 864, 867 (9th Cir. 1980).

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proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Under this section, the district judge must accept the truth of the factual assertions in the affidavit and determine only whether the affidavit is legally sufficient. See United States v. Azhocar, 581 F.2d 735, 739 (9th Cir. 1978), cert. denied, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979).

28 U.S.C. § 455 provides, in part, that:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

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That test is whether "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." United States v. Winston, 613 F.2d 221, 222 (9th Cir. 1980). In evaluating a judge's impartiality, the bias or prejudice "must stem from an extra judicial source." Azhocar, 581 F.2d at 739 (emphasis in original). We review the denial of a recusal motion for abuse of discretion. Sibla, 624 F.2d at 868-69.

Ronwin's specific allegations of bias or prejudice involve judicial acts which the district judge either

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> (b) He shall also disqualify himself in the following circumstances:
> (1) Where he has a personal bias or prejudice concerning a party . . . .

performed or failed to perform while presiding over the other actions in which Ronwin was a party. None of these actions involved extra-judicial acts which would indicate, on their face, prejudice or bias. Adverse rulings by themselves do not constitute the requisite bias or prejudice. Azhocar, 581 F.2d at 738-39. Ronwin also contends that the judge was prejudiced against him because the judge was a defendant in an action brought by Ronwin. However, "[a] judge is not disqualified merely because a litigant sues or threatens to sue him." United States v. Grismore, 564 F.2d 929, 933 (10th Cir. 1977), cert. denied, 435 U.S. 954, 98 S.Ct. 1586, 55 L.Ed.2d 806 (1978). Such an easy method for obtaining disqualification should not be encouraged or allowed.

Finally, Ronwin contends that the judge's alleged participation in ex parte communications with defense counsel indicated the judge's prejudice. Although a judge is generally required to accept the truth of the factual assertions in an Affidavit of Bias filed pursuant to 28 U.S.C. § 144, Azhocar, 581 F.2d at 739, Ronwin's allegation of ex parte communications relates to facts that were peculiarly within the judge's knowledge.[11] Given the judge's

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[11] Ronwin's allegation of ex parte communication between the judge and defense counsel was based on the fact that the counsel, in setting a hearing date on defendants' motion to dismiss, knew when the judge would be in Phoenix. According to Ronwin, counsel could only have obtained that knowledge through ex parte communications with the judge. Counsel explained, however, that he knew the judge would be in Phoenix on

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emphatic denial of Ronwin's allegations, and Ronwin's failure to show how such alleged communications indicated the judge's prejudice, the judge did not abuse his discretion by denying Ronwin's motion.

IV

CONCLUSION

We conclude that the district court did not abuse its discretion in denying the motion for recusal. We also conclude, however, that the court erred in dismissing the action as to the individual Committee members, and remand for further

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the day he suggested for a hearing because he had received an order from the court in another case assigned to the judge setting the same date for a hearing in the other case.

proceedings consistent with this opinion.[12/]

AFFIRMED in part; REVERSED in part, and REMANDED.

FERGUSON, Circuit Judge, dissenting:

It is now the law in this circuit that a person who has been judicially determined to be mentally unable to engage in the practice of law in the State of Arizona may still maintain a $1,200,000 damage action under the federal antitrust laws against the Committee on Examinations and Admissions of the Arizona Supreme

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12/ We note that many of the remaining issues may be suitable for resolution by means of summary judgment.

Court and the Committee's members[1/] for failure to give him a passing grade on the state bar examination!

[1/] The majority has dismissed spouses of the committee members for the perplexing reason that no specific allegations of wrongdoing have been made against the spouses. Maj. op., note 1, ante. However, in Arizona plaintiffs join spouses as defendants to reach their community property, not because the spouses are wrongdoers. A.R.S. § 25-215 requires that a cause of action based upon a community obligation be brought against both husband and wife. Eng v. Stein, 123 Ariz. 343, 599 P.2d 796 (1979). A community obligation is incurred when, for example, a husband's tort is committed in furtherance of the community's interest. Howe v. Haught, 11 Ariz. App. 98, 462 P.2d 395 (1969). In fact, plaintiff pleaded, "The male Defendants all acted on their own behalves and on behalf of their respective marital communities." Whether defendants actually acted on behalf of their marital communities is a question that the district court did not address and that the majority does not address. Since the case is remanded, resolution

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Precedents in this circuit and the Supreme Court mandate that when the grading procedures of the board of bar examiners are challenged, such a challenge must be brought against the state supreme court as defendant. Moreover, because the action of the state supreme court is state action within the Parker exception, that action is immune to an antitrust attack. Further, the impact of the

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of this material issue should have been left to the district court. That plaintiff did not specifically allege that defendants' spouses are wrongdoers is wholly immaterial.

The majority's expansive interpretation of antitrust law contrasts nicely with its restrictive view of plaintiff's remedies. The effect of dismissing defendants' spouses from the action is that now plaintiff may recover only from the separate property of defendants. See Eng v. Stein, supra, 123 Ariz. at 346, 599 P.2d at 799.

actions alleged by plaintiff are insubstantial and thus outside the antitrust laws. Consequently, I dissent from the majority's conclusion that the antitrust laws apply to this bar examination matter.

I. CHALLENGE TO DENIAL OF BAR ADMISSION.

A. Proper Defendant

A state's discretion over rules for admission to legal practice is vested in the judiciary, or the legislature. Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). In Hackin v. Lockwood, 361 F.2d 499 (9th Cir.), cert. denied, 385 U.S. 960, 87 S.Ct. 396, 17 L.Ed.2d 305 (1966), we held that the power to grant or deny admission to the bar is vested in the Arizona Supreme Court.

Hence, the State Committee on Examinations and Admissions was not a proper defendant because it was merely a committee of the Arizona Supreme Court with powers delegated by the court. Id. at 500.

In Hackin, plaintiff, the graduate of an unaccredited law school, could not take the bar because a state bar rule allowed only graduates of accredited law schools to take the bar. Plaintiff sued the justices of the Arizona Supreme Court, the State Bar of Arizona, and the Committee on Examinations and Admissions. In holding that the state bar and the Committee on Examinations and Admissions were improper defendants, the court explained:

> The State Bar of Arizona is not an appropriate party to the suit because it cannot promulgate or change the

> rules governing admission to practice in Arizona. Its Board of Governors can suggest rules to the Arizona Supreme Court, and can enforce them, but only with the approval of the Arizona Supreme Court. . . .
>
> In the original complaint, but not in the amended complaint, appellant names as a defendant the "Committee on Examinations and Admissions," presumably of the State Bar. This is not a committee of the State Bar, but a committee named by the Supreme Court of Arizona, made up of members of the Arizona State Bar, Rule 28(a). Thus we find the power to grant or deny admission is vested solely in the Arizona Supreme Court. . . .

361 F.2d at 499 (9th Cir. 1966).

Considering a similar admissions procedure, the court reiterated this conclusion in Chaney v. State Bar of California, 386 F.2d 962 (9th Cir. 1967), cert. denied, 390 U.S. 1011, 88 S.Ct. 1262, 20 L.Ed.2d 162 (1968). In that case, we held that the refusal

of the State Bar Committee to certify an applicant was not a terminative step in the admissions process. Because final decision is vested in the state supreme court, the committee's decision not to admit had no "fixative" status until the court approved or rejected the Committee's recommendation. Id. at 966. Once a decision is final, the supreme court is the proper defendant when a party complains about examination procedures. Thus, the Committee cannot be a party because it is merely an arm of the state supreme court "for the purposes of assisting in matters of admission . . .," which matters remain ultimately in the court. Id. If the plaintiff is deprived of a right, it is the state supreme court, not the Committee on Examinations and

Admissions, that is the source of the deprivation.

These decisions were reaffirmed in Brown v. Board of Bar Examiners, 623 F.2d 605 (9th Cir. 1980). The Bar Examiners of Nevada were found to be an improper party for the reason articulated in Hackin and reemphasized in Chaney,[1/] id. at 608. See also

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[1/] In Brown, a graduate of an unaccredited law school sued the Nevada Supreme Court, State Bar, and Board of Bar Examiners to allow her to sit for the bar. The district court dismissed the State Bar and the Board of Bar Fxaminers as improper parties under Hackin, yet issued an injunction against them. 623 F.2d at 608. In allowing the bar and the board to appeal, the court of appeals explained:

> We see no logic in the district court's novel rulings which currently dismissed appellants and yet granted specific relief against them. Whatever the rationale, however, appellants should not be denied appellate review of orders by which they are aggrieved.

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Whitfield v. Illinois Board of Law Examiners, 504 F.2d 474 (7th Cir. 1974) (reaching similar conclusion).

The harm suffered by the plaintiff, if any, is that resulting from the Arizona Supreme Court's refusal to admit him to the bar. Accordingly, Ronwin cannot sue the Committee on

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Id. Clearly, the court allowed the two parties to appeal because they were aggrieved. In dictum, the court said that Hackin, involving a challenge to the validity of a state supreme court rule governing admission to the bar, did not apply to make the state bar and the board improper defendants, since these were the only parties who could "physically comply" with an injunction requiring the defendants to let the plaintiff sit for the bar. Id. at 608 & 608 n.6. Even assuming the correctness of that dictum, it has no application to this case. Ronwin complains not of the failure of the state bar to seat him for the exam -- he failed it -- but of the failure of the supreme court to admit him. Admission to the bar is within the province of the supreme court, not the state bar, nor the committee.

Examinations and Admissions of the Arizona Supreme Court.

B. Limitations on Challenges

Court review of state procedures for admission and testing is guided by the rationale basis standard. Chaney v. State Bar, supra, at 964; Tyler v. Vickery, 517 F.2d 1089, 1099 (5th Cir. 1975), cert. denied, 426 U.S. 940, 96 S.Ct. 2660, 49 L.Ed.2d 393 (1976).[1/]

[1/] A variety of discretionary practices have been sanctioned by the courts. Statutes permitting admission without examination are valid. Shenfield v. Prather, 387 F.Supp. 676 (N.D. Miss. 1974). A state may validly require an applicant to pass an examination in essay form. Chaney v. State Bar, supra. A state may allow state graduates to waive examination without denying equal protection to other applicants. Huffman v. Montana Supreme Court, 372 F.Supp. 1175 (D.C. Mont.), aff'd, 419 U.S. 955, 95 S.Ct. 216, 42 L.Ed.2d 172 (1974). A board of bar examiners may validly meet to review borderline failure after all scores are

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While the discretion granted to states and bar examiners is broad, the opportunity to practice law is protected by the due process and equal protection clauses of the fourteenth amendment. Willner v. Committee on Character & Fitness, 373 U.S. 96, 102, 83 S.Ct. 1175, 1179, 10 L.Ed.2d 224 (1963). Brown v. Board of Bar Examiners, supra, established a definite procedure for challenging admission practices. Noting that admission procedures are purely a matter of local concern, Brown stated, "The only constraints on the states'

(Continued from previous page) tabulated. Hooban v. Board of Governors of Washington State Bar Ass'n, 85 Wash. 2d 774, 539 P.2d 686, app. dism'd, 424 U.S. 902, 96 S.Ct. 1092, 47 L.Ed.2d 306 (1976). Subjective grading by examiner is allowed. Tyler v. Vickery, supra.

exclusive jurisdiction are constitutional in nature. . . ." 623 F.2d at 609.

Brown outlined the alternatives available to an unsuccessful applicant:

> Since federal courts are granted jurisdiction under 28 U.S.C. § 1343 to vindicate constitutional rights, an issue arises as to the extent of a federal court's authority to participate in what is primarily a state concern. A dichotomy has developed between two kinds of constitutional attack which might be pursued by an unsuccessful bar applicant: "The first is a constitutional challenge to the state's general rules and regulations governing admission; the second is a claim, based on constitutional or other grounds, that the state has unlawfully denied a particular applicant admission." Doe v. Pringle, 550 F.2d 596, 597 (10th Cir. 1976), cert. denied, 431 U.S. 916, 97 S.Ct. 2197, 53 L.Ed.2d 227 (1977).
>
> In the first type of attack, federal district courts may assert jurisdiction under § 1343 to ensure that generally applicable rules of procedures do not impinge on constitutionally protected rights. Federal courts have

frequently entertained challenges to rules controlling admission to the bar, and have almost without exception sustained the validity of such rules. [Citations omitted].

On the other hand, a state court's decision on an individual application may not be disturbed in an original suit in federal district court. "[O]rders of a state court relating to the admission, discipline, and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to the state court . . . ." Mackay v. Nesbett, 412 F.2d 846 (9th Cir.), cert. denied, 396 U.S. 960, 90 S.Ct. 435, 24 L.Ed.2d 425 (1969). In exercising its judgment on an individual petition, a state supreme court performs a judicial act. In re Summers, 325 U.S. 561, 65 S.Ct. 1307, 89 L.Ed. 1795 (1945), reviewable in the Supreme Court. See Schware v. Board of Bar Examiners, supra, 353 U.S. at 238, 77 S.Ct. at 755; Konigsberg v. State Bar of California, 353 U.S. 252, 258, 77 S.Ct. 722, 725, 1 L.Ed.2d 810 (1957). A federal district court, in contrast, does not sit as an appellate court and therefore lacks jurisdiction to review

> state court actions denying admission to the bar, even though the denial allegedly involves deprivation of constitutional rights.

Brown, supra, at 609-10 (citations omitted). The plaintiff in Brown attempted the only viable challenge to state bar admission procedures -- a constitutional challenge. Brown denied jurisdiction because the plaintiff presented a claim of individual constitutional deprivation and the prayer for relief sought individual redress including monetary damages. Hence, the court found that the claim was not cognizable in district court. Brown, supra, at 611.

C. The Majority Opinion

The opinion disregards the tradition of deference to state discretion in admission procedures. Because such

deference has never existed toward the state's ability to regulate fees, the majority's reliance on Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), is misplaced. Further, the opinion creates an antitrust cause of action where the only challenge that might be appropriate is a constitutional one. Brown, 623 F.2d at 609. Finally, Brown held that a federal district court does not have jurisdiction over a claim against bar examiners because the state court is the real party in interest in admission cases. In addition, jurisdiction is allowed only where the suit alleges arbitrary and capricious procedures violative of due process. 623 F.2d at 610. However, the qualifications for admission in Arizona are "nearly identical" to

those unsuccessfully challenged in Brown. Id. at 610, n.9. Because Ronwin has sued the wrong defendant and because his suit raises no constitutional challenge to admission procedures, binding precedent requires that the district court's dismissal be affirmed.

II. THE ANTITRUST EXEMPTION.

The Parker antitrust exemption is grounded in our federal system:

> In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Parker v. Brown, 317 U.S. 341, 351, 63 S.Ct. 307, 313, 87 L.Ed. 315 (1943). The unfortunate effect of the majority

opinion is to attribute to the Sherman Act a congressional intent to limit a state's control over bar admissions.

The proposition for which National League of Cities v. Usery, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), stands, namely, that federal interference should not extend to essential state functions, is applicable to antitrust cases, in which Congress exercises its powers under the commerce clause. See Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 423, 98 S.Ct. 1123, 1142, 55 L.Ed.2d 364 (1977) (Burger, C.J., concurring in Part I of the Court's opinion and in the judgment); id. at 430, 98 S.Ct. at 1145 (Stewart, J., dissenting). I would think that regulation of bar admissions is an "integral operation in the area of

traditional government functions." See id. at 424, 98 S.Ct. at 1142 (Burger, C.J.). For that very reason, the Arizona Supreme Court oversees bar admissions and delegates authority to its agent. The state must have regulatory authority to examine the fitness and competence of bar applicants. If the state's agents abuse their authority, the proper remedy is a constitutional attack, not an antitrust attack that will undermine the authority that states qua states have to regulate bar admissions.

The majority applies erroneous standards to determine whether an agency of the state, that is, the Committee on Examinations and Admissions of the Arizona Supreme Court, is exempt from antitrust laws.

The majority incorrectly applies a test of compulsion by asking whether the action of the Committee was required by the state supreme court. The majority answers: "Like the defendants in Goldfarb, the defendants here have no statute or Supreme Court Rule to point to as directly requiring the challenged grading procedure." Maj. op., ante, at 696 (emphasis added).

However, the test of compulsion in Goldfarb, supra, applied only to private conduct of the county bar association and to the State Bar's joinder in that private conduct. In Goldfarb, the private county bar association adopted a fee schedule and the State Bar, "by providing that deviation from County Bar minimum fees may lead to disciplinary action . . .

voluntarily joined in what is essentially a private anticompetitive activity." Goldfarb, supra, at 791-92, 95 S.Ct. at 2015-16.

In analyzing the application of the compulsion test to the antitrust immunity of public and private defendants, Professor Areeda has wisely remarked:

> The Supreme Court and lower courts have not applied the compulsion language literally. In Midcal, 445 U.S. 97 [100 S.Ct. 937, 63 L.Ed.2d 233] (1980), the Court defined the criteria for immunity not in terms of compulsion but in terms of supervision and articulated state policy; the emphasis on supervision implies public scrutiny, deliberation and review, but not command. Id. at 105-06 [100 S.Ct. at 943-44]. And in Parker, 317 U.S. at 346-47 [63 S.Ct. at 311-12], the anticompetitive output limitations ultimately enforced by public officials originated in proposals from the beneficiaries.

> Lower courts employ the rhetoric of compulsion found in Goldfarb and Cantor, but immunize private action that is essential to a state regulatory scheme. . . .
>
> * * *
>
> Compulsion is not necessary in cases of public defendants. Immunity for decisions of subordinate agencies or officials cannot depend on an explicit command from the legislature; delegation of governmental powers necessarily includes the discretion to make decisions not compelled by the legislature.

Areeda, Antitrust Immunity for "State Action" After Lafayette, 95 Harv.L.Rev. 435, 438 n.19, 445 n.49 (1981).

In the instant case, the defendants are the committee and its members, a state agency and officials acting within their general ambit of authority granted by the Arizona Supreme Court. Since the activity of

public defendants is involved, the proper test for antitrust immunity is the one found in City of Lafayette, supra. The plurality in Lafayette concluded that "the Parker doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation." Id. at 413, 98 S.Ct. at 1137. An adequate mandate for state anticompetitive activity exists when it is found, from the authority given a governmental entity to operate in a particular area, that "the kind of action complained of" was contemplated. Id. at 415, 98 S.Ct. at 1138.

Thus, the proper test to apply to the action of the Committee is one of

state authorization, not one of compulsion. In deciding whether the action of the Committee was authorized, it is necessary to consider whether the Committee acted "pursuant to state policy to displace competition with regulation," City of Lafayette, supra, at 413, 98 S.Ct. at 1137, and whether that policy was "clearly articulated and affirmatively expressed." Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40, 51, 102 S.Ct. 835, 840, 70 L.Ed.2d 810 (1982).[1/]

[1/] I recognize that the majority believes an additional element of the immunity test is whether the state policy is "actively supervised by the state itself." Maj. op., ante, at 696. Professor Areeda, however, observes that the Supreme Court has not yet required that governmental acts be supervised by the state. Areeda, Antitrust Immunity for "State

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There can be no doubt that it was the policy of the Arizona Supreme Court -- and, of course, the policy of

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Action" After Lafayette, 95 Harv.L.Rev. 435, 445 & 445 n.50.

The cases cited by the majority do not apply the supervision test to public defendants -- and, of course, the Committee and its members are such defendants. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978), quotes the "active supervision" language of Bates, without applying any such test. New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96, 109, 99 S.Ct. 403, 411, 58 L.Ed.2d 361 (1978), makes no mention of an "active supervision" test. California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980) applies the test to a private defendant. Finally, Community Communications Co. v. City of Boulder, ___ U.S. ___, n.14, 102 S.Ct. 841 n.14 (1982), expressly refused to reach the issue of whether active state supervision was required.

Were the Midcal test of "active supervision" to be extended to include public defendants, I have no doubt
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the state's highest court is that of the state, see Bates v. State of Arizona, 433 U.S. 350, 360, 97 S.Ct.

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that the test would be satisfied in the instant case by the Arizona Supreme Court's review. Ariz. Sup. Ct. Rule 28(a) (1970); Ariz. Sup. Ct. Rule 29(c)VII(B) (1974).

The majority declares that a triable issue remains as to whether the submission made by the Committee to the supreme court pursuant to Rule 28(c) was adequate to enable the supreme court to engage in the kind of active supervision which the majority concludes is required before the state action exemption will be available.

Supreme Court Rule 28(c), as in effect at the relevant time, required the Committee to file its grading formula with the supreme court 30 days before the bar examination. As the majority notes, it apparently did not come to the attention of the district court, nor to this court until quite recently, that this rule was in effect at the time the conduct complained of by Ronwin occurred. However, this supreme court rule has the force of law, and the court can -- indeed must -- consider it in deciding whether the Committee's conduct was actively supervised by the court.
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2691, 2697, 53 L.Ed.2d 810 (1977) -- to displace competition with regulation. Indeed, any effort to limit admission to the bar will limit the open competition of the market place. As part of the regulatory scheme, the supreme court adopted a

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In addition to considering the effect of Rule 28(c), however, the majority has also given weight to evidence not presented to the district court, and indeed not presented to this court until long after oral argument, purporting to bear on the actual nature of the submission made pursuant to Rule 28(c). The record made by the parties in the district court contains no evidence whatsoever that would suggest any failure by the Committee to adequately inform the supreme court of its grading policies and procedures. I find it irregular for the court of appeals to go outside the record to decide an appeal from a dismissal by the district court. As a matter of due process, the parties have a right to have their appeal heard on the basis of the factual record assembled in the court below.

rule directing its Committee to "examine applicants and recommend to this court for admission to practice applicants who are found by the committee to have the necessary qualifications." Rule 28(a) (1970). Surely this authorization by the Arizona Supreme Court "contemplates" that its Committee would engage in the "kind of action complained of" by plaintiff, namely, the establishment of bar admission standards and grading procedures.

The majority relies on Goldfarb, rather than Bates, supra, as analogous to the instant case. Though neither Goldfarb nor Bates is an exact replica of the case at hand, Bates is more directly on point. Goldfarb would be more relevant if, in the instant case, the Arizona Supreme Court had rejected

the Committee's procedures; the state supreme court in Goldfarb had warned the state bar against enforcing the challenged fee schedules. Goldfarb, supra, at 789, 95 S.Ct. at 2014. In contrast, the Arizona Supreme Court approved the procedures challenged here by accepting recommendations for admission based on those procedures.[i/] This implied validation of the board's grading system renders Bates the more direct and proper analogy.

[i/] In further contrast, the defendant in the instant case is a public defendant carrying out a state policy, whereas the defendants in Goldfarb were the private county bar and the state bar joining in essentially private activity. See dissent 702 supra.

In Bates, the activity of the state bar was to enforce a prohibition against advertising. There, the state bar was immune because the supreme court had promulgated the rule. The alleged anticompetitive result was to monopolize. In the instant case, the challenged activity is the grading of examinations on a curve. The state supreme court has entrusted the grading of examinations to the state bar. The alleged anticompetitive result is artificially to limit the number of attorneys and thereby to monopolize. The opinion erroneously subjects the state bar to antitrust laws by focusing on the alleged result and ignoring the immunity issue decided in Bates.

The majority has relied on two cases in which no antitrust immunity was

found for cities charged with antitrust violations. City of Lafayette, supra; City of Boulder, supra. Those cases are inapposite, as they involve actions by cities. Such actions deserve close scrutiny, as there is justifiable concern that a city may advance local, parochial interests, rather than the interests of the people of a state. The federalist compromise, of course, only provides antitrust immunity where the state's interests are concerned. In the instant case, however, an arm of the state supreme court, not a city, is doing the regulating. Moreover, the regulation concerns a matter of statewide interest -- the qualifications of admittees to the bar -- not a matter of local concern. The regulation of admission to the bar is

at the core of the state's power to protect the public.

City of Boulder, supra, actually lends support to the position that antitrust immunity should apply in the case at hand. In explaining why antitrust immunity should not be conferred on a city exercising home rule powers granted by the legislature, the Court in City of Boulder stated:

> [P]lainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere neutrality respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers granted," since the term, "granted,"

> necessarily implies affirmative addressing of the subject by the State.

City of Boulder, supra, 455 U.S. at 55, 102 S.Ct. at 843 (emphasis in original). By no stretch of the imagination has the Arizona Supreme Court taken a position of "neutrality" allowing the Committee to do as it pleases. To the contrary, the Arizona Supreme Court has affirmatively addressed the subject matter of this suit by granting to the Committee the power to examine applicants and to recommend for admission to the bar those who are found to have the necessary qualifications.[6/]

[6/] Arizona Supreme Court Rule 28(a) (1970), which assigns to the Committee the duty of screening applicants, provides in pertinent part:
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I am concerned that the majority, by holding that the anticompetitive action in this case was not authorized by the state and is not shielded by the state antitrust immunity, has opened wide the door to antitrust scrutiny of virtually all acts by agents and officials of the state who carry out policies of statewide concern. The foreseeable consequence

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> The Committee shall examine applicants and recommend to this Court for admission to practice applicants who are found by the committee to have the necessary qualifications and to fulfill the requirements prescribed by the rules of the board of governors as approved by this Court respecting examinations and admissions. . . . The Court will then consider the recommendations and either grant or deny admission.

of multiplication of antitrust actions accompanied by the threat of treble damages will be timorous decision-making by state officials entrusted with the public interest. The day when every act of an agent or official of the state who has been delegated power pursuant to state policy becomes subject to scrutiny for violation of the antitrust laws will be the day that our federalism has become gravely weakened.

III. ALLEGED IMPACT ON COMMERCE.

In order to prevail in an antitrust suit, a party must demonstrate an effect on commerce which is "more than trivial" in the relevant market. Gough v.

Rossmore Corp., 585 F.2d 381, 389 (9th Cir. 1978), cert. denied, 440 U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979). Plaintiff's complaint neither identifies a relevant market nor alleges a substantial impact on such a market. A court should give a party the opportunity to demonstrate the elements of his case if his claim presents the possibility that he may prove substantial impact. However, on the facts of this case, plaintiff could not demonstrate more than the trivial impact of a curved grading system. The ability of applicants to reapply permits them to remain within the potential commerce stream.

In addition, the opinion relies on McLain v. Real Estate Board, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980), for the proposition that Ronwin could "conceivably" demonstrate impact on the relevant market. The relevant market in this case, however, while not defined before the district court, is a broad and diffuse market that is not analogous to the well-defined property market in New Orleans with a specific percentage of out-of-state contractors. Without more, the conclusion of a conceivable impact in Ronwin does not flow from the facts of McLain.

CONCLUSION

For the foregoing reasons, I dissent.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD RONWIN, Plaintiff-Appellant, v. STATE BAR OF ARIZONA, ARIZONA, CARLOCK GEORGE READ and WANDA MYERS) ROBERT D. and JUDITH) WOLFINGER, HAROLD J.) and JANE DOE RICHMOND, JAMES L. and JANE DOE HOOVER,) CHARLES R. and JANE DOE, Defendants-Appellees.	)	No. 80-5004 D.C. #CIV 78-193 O R D E R

Before: FERGUSON and BOOCHEVER, Circuit Judges, and HATTER,* District Judge.

A majority of the panel in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and, upon a call for a vote, the en banc call failed to receive a majority of votes of the eligible judges.

The petition for rehearing is denied and the suggestion for rehearing en banc is denied.

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*Honorable Terry J. Hatter, Jr., United States District Judge for the Central District of California, sitting by designation.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD RONWIN, Plaintiff-Appellant, vs. STATE OF ARIZONA, CARLOCK, GEORGE READ and WANDA MYERS, ROBERT D. and JUDITH WOLFINGER, HAROLD J. and JANE DOE RICHMOND, JAMES L. and JANE DOE KARMAN, HOWARD H. and JANE DOE HOOVER, CHARLES R. and JANE DOE, Defendants-Appellees.	)	No. 80-5004 DC CV 78-193 MLR

APPEAL from the United States District Court for the District of ARIZONA (Phoenix)

THIS CAUSE came on to be heard on the Transcript of the Record from the

United States District Court for the District of ARIZONA (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of said District Court in this Cause be, and hereby is affirmed in part; reversed in part and remanded.

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Filed and entered September 8, 1982

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*/Attestation of December 10, 1982 deleted.